Appendix "A"

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The United States District Court
For the Northern District of California

United States of America, Plaintiff, vs. Public Utilities Commission of the State of California, Defendant.	No. 35101

Before Lemmon, Circuit Judge, and Oliver J. Carter and Hamlin, District Judges.

Lemmon, Circuit Judge.

"To git thar fustest with the mostest men" was the recipe for victory announced by General Nathan Bedford Forrest, the Confederate cavalry leader.

There is as much military wisdom in that dictum today as there was a century ago. In this atomic age, speed in the movement of men and supplies is still necessary.

In the instant case, the theory of the plaintiff, as expressed in its complaint, is that if Section 530 of the Public Utilities Code of California, as amended in 1955, *infra*, hereinafter referred to as "Sec. 530", is held to

apply to shipments made by the plaintiff, "it would greatly impede the discharge by the United States of its constitutional powers and responsibilities by inevitably causing delays in such shipments when time is of the essence and in many situations would expose to the public patterns of movement and traffic which would be subject to interpretation by the intelligence agents of foreign powers and might jeopardize the security of the United States."

At the trial, the plaintiff put on a parade of witnesses whom we have found to be impressive. Most of them were officers in the Department of Defense, one of them being a brigadier general of the Army. Those witnesses were most emphatic in declaring that the application of Sec. 530 to military freight shipments would be costly and time-consuming, and would have a "chaotic" effect upon the defense activities of the United States.

The defendant, on the other hand, both in its testimony and in a most solemn unilateral stipulation by its chief counsel, *infra*, insisted that it would apply Sec. 530 in a manner that would not impede the plaintiff's defense measures. We may point out in passing, however, that neither the defendant nor its learned chief counsel can bind their successors by even the most impressive testimony or the most solemn "stipulation". But we do not bottom our decision upon this ground.

We are convinced of the complete honesty and good faith of each party to this suit. We believe that the record contains not a single sentence of perjurious testimony. We think that each witness, in the language of the day, "called it as he saw it".

But the crucial question here presented can be resolved by neither the assurance of responsible defense witnesses nor counsel's formal avowal that the statute would be "reasonably" applied to the plaintiff's shipments and the interests of the United States would in no wise be injured. The problem before us is not one of *administrative discretion* but of *Constitutional* power:

May a State statute *empower* a State Commission, however patriotic and well-intentioned that Commission may be, to "permit common carriers to transport property at reduced rates for the United States, state, county or municipal governments, *to such extent and SUBJECT to sych conditions as IT may consider just and reasonable*"? [Emphasis supplied.]

Reluctant as we are to declare invalid any part of a State statute, we are impelled to hold that, in so far as the plaintiff is concerned, that part of Section 530 which purports to limit the plaintiff's enjoyment of reduced freight rates according to the defendant's pleasure, is in contravention to the Constitution of the United States, as placing an improper restriction upon the plaintiff in the exercise of its sovereign powers related to the national defense.

1. *Statement of the Case.*

On December 2, 1955, the plaintiff filed a complaint in the above-entitled cause, to have this Court declare that certain sections of the California Public Utilities Code, *infra*, are unconstitutional, and to have the California Public Utilities Commission permanently enjoined from taking any action under those sections.

On the same day, Judge CARTER signed an order to show cause and a temporary restraining order, supported by a "Verification and Affidavit" by Captain F. L. Haerlin, USN, together with an order to show cause why an *interlocutory injunction* should not issue during the pendency of the action.

On December 22, 1955, a motion to dismiss the complaint was filed. That motion was denied on February 17, 1956, and by agreement the temporary restraining order was continued in effect in lieu of an interlocutory injunction.

On January 27, 1956, a large group of common carriers filed a motion to intervene as defendants. That motion was denied, "without prejudice to the right of the applicants in intervention to appear amicus curiae in further proceedings in this case."

On February 3, 1956, the California Manufacturers Association filed a motion to appear as amicus curiae. That motion was granted.

On February 6, 1956 Major Generals Paul F. Yount and John P. Doyle, of the United States Army and the Department of the Air Force, respectively, filed affidavits to the effect that the allegations of the complaint are true, to the best of their information and belief. They are the transportation heads of their respective branches of the armed forces.

The defendant filed its answer on February 27, 1956.

2. *The Complaint.*

The plaintiff alleges that in July, 1955, the California Legislature amended Sec. 530 of the Public Utilities Code

and deleted therefrom "the express exemption from the general provisions of the Code of Shipments of property" of the plaintiff. California Stat. 1955, Ch. 1966. This amendment likewise expressly provided that carriers could grant reduced rates to the plaintiff only with the permission and under conditions determined by the defendant.

It is averred that in so far as Sec. 530 and related sections of the Public Utilities Code prohibit carriers from shipping property for the United States at rates different from those approved by the defendant, they are void under Article VI, Sec. 2 of the Constitution of the United States, in that:

1. For no valid reason within the police powers or other reserved powers of the State, they place an unreasonable burden and impediment on the United States in the discharge of its Constitutional powers and responsibilities.

2. They place an unreasonable burden on interstate commerce in an area under the exclusive jurisdiction of Congress, under the Constitution.

3. They contravene the policy of Congress implicit in the Federal Property and Administrative Services Act of 1949, relating to the negotiation for the transportation of property for the plaintiff, and enacted pursuant to the power conferred upon Congress by the Constitution.

4. Insofar as the Public Utilities Code of the State imposes penalties upon common carriers for failure to ship property for the plaintiff at rates other than those approved by the defendant, it is repugnant to Amendment XIV of the Constitution, in that it is vague and uncertain because it imposes upon carriers the duty of resolving

intricate questions of law and fact in determining what particular shipments of persons or property may be in intrastate or in interstate commerce.

Wherefore it is prayed that, on final hearing, judgment be entered declaring that insofar as Section 530 "and related provisions prohibit carriers within the State from shipping property" of the plaintiff "at rates other than those approved by the defendant, it [sic] is unconstitutional and void"; and that the defendant be permanently enjoined from making any effort to prohibit carriers within the State from negotiating and making arrangements and contracts for the carriage of property of the plaintiff at rates and charges other than those determined by such contracts and arrangements between the plaintiff and the carriers.

3. *The Motion to Dismiss.*

The motion to dismiss and its supporting brief set forth that:

1. The Court lacks jurisdiction over the subject matter of the complaint, because:

(a) The complaint does not allege an "actual controversy" within the meaning of 28 USCA Sec. 2201; and the plaintiff therefore is not entitled to a declaratory judgment.

(b) The plaintiff has failed to exhaust the administrative remedy available to it in a proceeding before the defendant.

(c) The complaint involves a matter within the primary jurisdiction of the defendant as an administrative agency of the State.

(d) This Court is prohibited by the Johnson Act, 28 USCA Sec. 1342, from granting the relief requested by the plaintiff. The Johnson Act is as follows:

> "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> "(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> "(2) The order does not interfere with interstate commerce; and,
>
> "(3) The order has been made after reasonable notice and hearing; and,
>
> "(4) A plain, speedy and efficient remedy may be had in the courts of such State."

(e) The plaintiff will not suffer irreparable injury in the absence of injunctive relief by this Court, but has an adequate remedy elsewhere. On the contrary, persons other than the plaintiff have suffered, and will continue to suffer, irreparable injury as a result of this Court's granting the plaintiff's request for injunctive relief. "'. . . the Commission, in compliance with this Court's restraining order, indefinitely suspended the cancellation of a provision in Minimum Rate Tariff No. 2, and thereby continued, for an indefinite period of time, the opportunity for some carriers to hold rates at a 'depressed and unreasonably low level'."

(f) The Court is required by law to abstain from granting the relief requested by the complaint in order to

preserve comity in the relationship between the plaintiff and the State of California.

(g) The subject matter of the complaint is within the exclusive jurisdiction of the State.

2. The complaint fails to state a claim upon which relief can be granted. In addition to the "deficiencies" already pointed out, there are additional defects: "Most of the allegations of the complaint are not well pleaded for one reason or another. They are either vague, or ambiguous, or conjectural, or irrelevant, or conclusions rather than specific allegations of fact. . . . the only things left are allegations that the California Legislature amended Section 530 of the Public Utilities Code, and that the application of such amended statute will result in increased cost and expense to the United States in the transportation of its property. . . . [These two allegations] do not furnish any basis for relief by this Court."

4. *The Plaintiff's Position.*

The plaintiff's brief was filed after that of the defendant, and is partly in answer thereto. Its main points are stated in its complaint, which is, to a certain extent, argumentative and contains considerable background material.

In addition, the brief asserts:

I. The Court has jurisdiction over this action, because the "gravamen of the plaintiff's case lies in its assertion that from the nature of the rate regulating process any subjection of it to the process will directly and drastically interfere with its constitutional responsibilities, principally that of supplying the armed services."

II. The plaintiff's lines of supply are such that any local interference with them is a matter of national concern.

III. Any state statute that places an unreasonable burden or impediment on the discharge of a federal function is unconstitutional. The local interest involved must be balanced against the national interest with which the statute interferes.

IV. The defendant's regulation of rates for carrying the plaintiff's property would seriously interfere with the lines of supply and place a great burden on the officers of the United States charged with responsibilities in the supply function.

V. The defendant's regulation of rates for carrying the plaintiff's property would not benefit the citizens of California in any way whatsoever. The contrary would be true.

VI. Many shipments that appear to be *intrastate* are in fact *interstate* because they are in the stream of interstate commerce or are shipped to or from places over which the plaintiff has exclusive jurisdiction. Any effort to apply Sec. 530 in such situations would result in confusion, friction, and needless litigation.

VII. Pursuant to its Constitutional powers, Congress has clearly expressed the policy that all shipments for the plaintiff shall be made by special arrangements, and Sec. 530 as amended is directly contrary to this policy.

5. *Section 530, as Amended.*

On July 12, 1955, Sec. 530 of the Public Utilities Code of California was amended to read as follows:

"Every common carrier . . . may transport, free or at reduced rates: (a) *Persons* for the United States, state, county, or municipal governments, or persons or property for charitable or patriotic purposes . . . The commission may permit common carriers to transport property at reduced rates for the United States, state, county, or municipal governments, *to such extent and subject to such conditions as it may consider just and reasonable.* Nothing herein shall prevent any common carrier subject to the provisions of this part from transporting property for the United States, state, county, or municipal governments, at reduced rates *no lower than rates which lawfully may be assessed and charged by any other such common carrier or by highway permit carriers.* . . ." [California Stat. 1955, c. 1966.] [Emphasis supplied.]

Before the amendment, the first sentence of Sec. 530 read in pertinent part as follows:

"Every common carrier subject to the provisions of this part may transport, free or at reduced rates:

"Persons OR PROPERTY for the United States," etc.

The deletion of the two emphasized words has given rise to the present controversy.

6. *The Testimony.*

The first and principal witness for the plaintiff was Brigadier General Edmond C. E. Lasher, Assistant Chief of Transportation of the Army for Traffic, who represented the Department of Defense in his testimony. Although fourteen witnesses testified at the five-day trial,

General Lasher's testimony, covering more than one hundred pages, takes up nearly one-fifth of the 552-page transcript.

General Lasher was an intelligent, forthright, and impressive witness. He told the Court that "The policy of the Department of Defense is to utilize the commercial transportation industry of the United States to the fullest extent possible."

"This policy," the witness continued, "has been adopted primarily on the theory that the broader that common carrier base in the United States is, the better prepared transportationwise we will be in the case of emergency, and therefore we utilize military-owned transportation to a minimum extent and only where commercial transport cannot meet the requirements of the particular traffic involved."

(a) *The "Pattern of Traffic".*

A trifoliate standard is observed by the plaintiff in choosing "the modes of transportation for the armed services", General Lasher explained:

> "The first requirement, of course, in all our transportation is to select that carrier within that mode which best accomplishes the requirements of the particular traffic involved. The needs of the government are, of course, paramount. Secondarily, the question of cost is involved; and thirdly, the division of traffic amongst the carriers who are able to carry it."

There are "many, many points of difference between commercial requirements . . . and military requirements for transportation", and commodities in military traffic

"are never in competition" with commodities in commercial traffic, the general said.

"As a matter of fact," he added, "oftentimes they are moving opposite to the flow of commercial or industrial traffic."

The "pattern of traffic" for the plaintiff generally "must follow the flow of requirements" and *cannot be fixed by State boundaries*, General Lasher emphasized.

(b) *Commodity versus Class Rates.*

The Army transportation expert explained the rate-making procedures for the transportation of government materiel in the plaintiff's depot system.

"Our goods move generally on tariffs," General Lasher stated, "but as we find penalty class rates applying to our traffic, we ask the carriers to sit down and negotiate with us. That is done on a direct basis with the carriers under the provisions of . . . Section 22 of the Act to regulate interstate commerce.[1] The rate and arrangements finally agreed upon, or finally proffered, I will say, by the carrier or carriers is a rate voluntarily given and a rate which, in most cases, we believe is a rate that carrier can move the traffic for and still make a profit on his business."

The outgrowth of *commodity* rates from *class* rates was then traced by the general.

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[1]The opening words of that lengthy section are: "Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States," etc. (49 USCA Sec. 22.)

"Well, it's the law that carriers must—we will take the railroads—must be able to quote a rate to a prospective customer on any item from any point in the United States to any other point in the United States. It was apparently impossible to price each and every item of commerce. So these items of commerce were placed in about a dozen classes. However, it is quite obvious that there would be no movement of oranges from Maine to Florida, yet there is an applicable rate in these class rates.

"As commerce grew, industry spread out, it was necessary to afford industry a cost of movement more nearly geared to the requirements of that movement, so that the goods upon arrival at destination were not too costly for the consumer, and a system of commodity rates in lieu of class rates grew up.

"The commodity rate is a rate from a point of manufacture, let's say, to a point of distribution or consumption, which is based upon a volume move, based upon the facility of the manufacturer to get his goods to market, allowing him as much in the way of profit as possible and the carrier, too. So we find that commodity rates generally move commerce in the United States today. Class rates do not. As a matter of fact, they are popularly referred to as paper rates, rates which are on the books to satisfy the law."

(c) *Spark Plugs, Doughnuts, and a Korean Bottleneck.*

After describing at some length the "depot system" of the Army in particular and the Department of Defense in general, the military transportation expert illustrated the

need of speed in supplying the needs of the armed services, by graphically describing a "bottleneck" involving the lowly spark plug.

"There is no substitute for a part, for an item, if you don't have it," General Lasher said. "And I would like to stress the importance of making this system work.

"Among other of my duties I was transportation officer of the Eighth Army, during the first year in Korea, and we had a lot of truck companies over there, a lot of trucks. The length of Korea was such that we had to use a great deal of transport, and particularly as we raced north to the Yalu River. * * *

"The sad part of it was that we had many trucks deadlined, out of commission for lack of parts; and [of] three of the ordinary items [of] which we were in shortest supply, one was spark plugs, one was spring leads, and one was sealed beam headlights—items which I knew were coming off the production [lines] in the United States like doughnuts. Spark plugs tumbling off! I could see them! *We couldn't get a spark plug.* Not because there weren't spark plugs available, but because the logistics system wasn't working for one reason or another.

"Nothing must be placed as an impediment to the complete flexibility and flow of movement of supplies to our troops in foreign theaters, whether it's in peace or in war."

(d) "*We Would Never Win the War!*"

In reply to a question regarding the effect that State regulation of rates for intrastate shipments of the plain-

tiff's materiel "would have on the supply lines and logistical system of the United States," General Lasher said:

> "If we were . . . forced to go to State regulatory bodies in order to arrange for the movement of our traffic and the rates upon which it moves, we would find ourselves in a time-consuming job of spreading before the public the requirements of the military.
>
> "First of all, let me say that it is only until recently that I have had to take into consideration whether certain of our traffic was or was not interstate, and in attempting to prepare myself somewhat, I tried to read some law and I was—I found out that I was terribly confused, that it would be very difficult for me to distinguish in most cases, for we do not know when an item starts out on its journey from the processor whether it is going to be consumed in North Dakota or Florida or Cambodia.
>
> "Now, one of our difficulties right away would be for the clerks in our thousands of post camps, stations and bases throughout the United States, our clerks to determine whether this item was intra- or interstate. It apparently is a rather moot question at law, let alone at the administrative level of a clerk earning $3500 or $4000 a year.
>
> "Now, then, for us to make these arrangements at the Washington level with the various states, let us say 48 states, with 48 varieties of methods to follow, we would find ourselves in an administrative *morass* out of which we would never fight our way, *we would never win the war!* Our negotiations for these arrangements, and I don't say just rates, but our negotiations for arrangements for the movement of traffic must be flexible; they must be direct with the parties in interest, *and they must be as secure as possible.*

"We haven't touched on the security yet, but security is of primary importance to us. . . . Were we to spread . . . the record of the characteristics of our freight before the public and the parties at interest, we would seriously jeopardize that security, and in some cases be in violation of the law."

(e) *The Security Problem.*

Expatiating upon the security phase of the problem, General Lasher continued:

"There are many items which move today which are not described, some items which are willfully misdescribed in order to hide their identity, and they are moving in quantity. The only people who know what they are are about four. The carrier, whether he be a highway carrier or rail, usually doesn't know what he is carrying; but he has been told by one of his officials that that is what he will carry and the billing will be such and such and the security of that item is thereby maintained.

"Were we to have to go through a regulatory body, we would never be able to accomplish this."

The general added that State regulation of rates would tend to increase the freight bill of the Federal Government:

"Getting back to these class and commodity rates again, the procedure would be so cumbersome and so time-consuming that we would, in desperation, ship on the class-rate structure rather than wait for the procedures to be consummated and thereby increase considerably our transportation cost."

In 1955, "a peacetime year, rather quiet year," the Department of Defense spent about a half billion dollars.

In "a typical wartime year", the expenditure was "four to five billion dollars", the General stated.

If the various States regulated the rates for the intrastate shipment of military materiel, the Department of Defense would have "to increase our force many times, in my opinion", General Lasher declared.

"Maybe not 48 times," he explained, "but we would have to be ready to concurrently handle with several of the State regulatory bodies concurrently at the same time. So that we would have to have a multiplicity of groups, if you will, so that they could be handling concurrently so as not to delay things any more than necessary."

Finally, the entire depot system of the plaintiff would probably have to be rearranged, General Lasher asserted.

"Our depots are now set, upon the present system, whereby we can with facility make arrangements according to it. If we have 48 different jurisdictions, the pattern of our traffic will necessarily change because of the 48 different ideas as to how our traffic should . . . flow, and depending upon the pattern which falls [flows?] out from those various jurisdictions, we would then have to adjust our logistics system to comply with the new circumstances rather than the circumstances with which we find ourselves confronted now."

(f) *The Power Is the Threat.*

On cross-examination, General Lasher conceded that the defendant "or any other state commission, for that matter, would be most receptive to any representations we of the military might have before such hearings."

"But," he added, "the mere fact that we would have to make such representations is to me the crux of this. Again I go back to my original testimony wherein I stated that the mere fact that we have to spread the record with things which we might not want to spread the record with is inimical to our best interests."

Emphasizing that the plaintiff is "alarmed" not by the defendant's administration of the power given to it by Sec. 530, but by *the existence of the power itself*, the General testified:

> "However magnanimous the Commission itself might be, or at any one time, depending upon its makeup, or however uncompromising it may be, depending upon some other makeup, what we view with alarm is an obvious intent to further regulate our logistic system by regulating the traffic which moves for it."

The witness conceded that he had "no reason to think that the Commission will not act reasonably".

The plaintiff's transportation expert also conceded that, although the present system is "good", there have been some few "abuses" under Sec. 22. In enlarging upon this statement, General Lasher testified:

> "Individual carriers wi" at times, in order to capture traffic which they might otherwise not have, quote for the Government under the umbrella of Section 22, rates far below the going rate in order to get a small piece of business. This abuse is very difficult to eradicate. However, the number of carriers by any mode of transportation who resort to that practice are, in the total number of carriers involved, very, very few."

The General added that he would advocate one change in the Interstate Commerce Act, namely:

> "A wording . . . to allow of such administrative procedures as would prevent the abuses which I mentioned a while ago. I said we were constrained to accept a low rate. We are constrained to do so because if we do not, then in the opinion of some people we are squandering the taxpayer's money. We do not want to be placed in that position. Therefore, if administratively we could have the authority and the Comptroller General of the United States also had the mandate from Congress, we could so administer Sec. 22 as to prevent these very abuses."

(g) *The Problem of Segregation.*

Lieutenant Colonel George A. Hall, Chief of the Transportation Division of Sharpe General Depot at Lathrop, California, testified that the Depot was carrying 61,800 "line" items a few days before he appeared in court. That figure did not include items used in repair and maintenance, "nor the items themselves that are in maintenance, such as bulldozers and locomotives and that sort of thing". The Depot ships primarily to points in the West Coast, in the Sixth Army area, embracing eight Western States. The turnover at the Depot is approximately 15,000 tons per month at the present time, "in and out".

The transportation expert testified that the Depot has "interstate and intrastate materiel so commingled that we could not possibly segregate it". He added that if the defendant assumed jurisdiction over the regulation of rates on the shipments from Sharpe, it would "just be impossible at the present time" to determine what mate-

riel was in fact interstate and what was intrastate, in so far as the regulations were concerned.

In addition to supplying the armed services, the Sharpe Depot stores strategic materials, and also serves "as a source of supply" in disaster relief.

"One normally thinks of the Army in connection with a military disaster," Colonel Hall said. "Actually, that is not entirely correct. Take the recent flood. We are prepared, ready to go to work in case of any *civilian* disaster.

"During the flood we shipped approximately 225 truckloads of either flood relief material or equipment to fight the flood. . . . At the present time . . . the sources of danger in the area are considered, number one, earthquake; second, fire; third, flood; fourth, enemy action. We are prepared to go on 24-hour duty in the event of any disaster."

Colonel Hall remarked that there are a number of movements which are so urgent and to such out-of-the-places [sic] that there is no appropriate rate structure for them.

(h) *A "Completely Chaotic" Situation.*

Replying to a question regarding what would happen at Sharpe if the restraining order in this case, *supra*, were lifted, "and the statute as you understand it went into effect" Colonel Hall testified:

> "Well, I can't imagine operating under such circumstances. *The situation in my office would be COMPLETELY CHAOTIC!* * * * We would have a lot of additional rating to do other than the physical

handling, as I see it. I only have one rate clerk in my office, who is rating comparatively few shipments now. As I see it, he would be rating a good many under the circumstances described. * * * If we did try to consolidate it all, we would have to try to consolidate according to the freight classification rather than the present broad description that we are now able to operate under. . . . It would be a considerable burden upon my office. I would guess that it would increase our costs of billing—I am talking of the billing alone, the accomplishment of the paper work—some 40 per cent. It costs us $1.71 at Sharpe to issue each bill of lading. That is just the paper work of having a bill of lading prepared. The more complicated it becomes and the more bills of lading . . . that we issue, obviously that cost is going to go up. Of course, it would result in additional costs out on the shipping floor. * * * the increase in paper work would go all the way up the line. There are more pieces of paper, more bills of lading, more shipping documents, and all the way up to finance and general accounting office, there would be additional paper work as a result."

Another difficulty would arise in the negotiation of rates, Colonel Hall stated.

"I do not know just how it is contemplated that we will negotiate for rates. When I say 'we' I mean the Department of the Army as a whole, how we would negotiate for rates. I would assume that it would require a series of officers in various localities to appear before the various state regulatory bodies. Of course, it would seem to me that they would impose a considerable burden upon the installations themselves asking for supporting data and testimony.

I am not very well equipped at my place. We are strictly an operations office, not a statistical office, and I could not spare the time at the moment for too much of that."

(i) *The Spy's Jigsaw Puzzle.*

On the subject of required secrecy in certain cases, Colonel Hall stated that "really over a period of time *every military shipment is in a sense a security shipment.*"

"I had some experience in Europe in that situation," the Lieutenant Colonel explained. "A trained intelligence worker, espionage worker, can develop an amazing amount of accurate information just through looking at the records, say, for a month's time on our very prosaic shipments—shoes, medical supplies and food. Actually, a month's record of shipments to an installation will indicate how many troops are there, the status of training of the troops, the status of their health and their overall motion as well as their ultimate destination."

Colonel Hall added that he did not think it would be possible to reveal the necessary data for logical and reasonable rate approval purposes in connection with many of the shipments that are secret in nature.

"If everything is to be made public, we might as well publish it in the newspapers," he declared.

On cross-examination, the transportation expert said that he did not know whether the defendant would require the publication of all the records of carriers transporting secret Governmental material.

"They *could*, under the circumstances, I would say," the officer remarked.

Regulation by the defendant as contemplated by the statute in question would interfere in certain Governmental shipments to the following extent, Colonel Hall testified:

> ". . . now the office of Chief of Transportation can go direct to a competent carrier, or group of carriers, and explain the situation and whatever dealings are made are done very rapidly and easily, direct with the carriers. As I see it, in such a case as this, we would be going through the State Commission and we would not, in such case, necessarily deal directly with the carrier."

Lieutenant Colonel Andrew Paul Flanagan, Transportation Corps, Regular Army, stationed at Washington, D.C., testified that he is "charged with the responsibility for negotiating rates with commercial carriers, nationwide, for the movement of Department of Army freight". He stated that the regulation of rates by State Commissions for the movement of Government properties would interfere and impede him in the discharge of his responsibilities.

"If this situation should spread to other States," he continued, "we would be faced, in my opinion, with an intolerable situation. We would be deprived of the flexibility and the expeditious methods we now have of establishing rates on army military traffic."

(j) *"The Need to Know"*.

Colonel Flanagan discussed the "need-to-know" basis of security information, the principle of which had already been explained by General Lasher.

"In the case of where the carrier has a representative with a carrier's security clearance, I will tell that individual, not everything about the shipment, but all that he needs to know. We must realize that this classification, if a man is cleared for top secret, you do not have to tell him everything. It is on a need-to-know basis. You tell him only what he needs to know. I tell him sufficient information about that traffic so he knows that what we are asking for is just and reasonable, and he is satisfied, and this is the only man that I have to convince—no one else."

Giving only "the skeleton facts" of a certain secret movement, *which was still taking place at the time he was testifying*, Colonel Flanagan told how his office and the carrier established a rate that represented a saving of about $500,000 as compared with the "class rate".

"We would have been faced on this movement [with] classification by analogy, which would have thrown us into a very high class-rate structure. There are also certain arrangements to be made—emergency arrangements and airplane—[we?] discuss this matter with the freight traffic manager of the carrier concerned.

"Incidentally, he did not know anything outside the origin and destination. He didn't know what the actual commodity was and I couldn't tell him what the actual commodity was.

"The shipment is moving in substantial volume, trainload lots. The difference between the two rates, you might say, the class rate structure and the rate we established, which incidentally gave the carrier a revenue of over $2.00 a car a mile on the rate we did establish, *was approximately a half a million dollars on that move.*"

The Colonel also testified regarding a similar saving of $73,000 on a small-arms and ammunition shipment from Belmont, Arizona, to an air field in Utah.

(k) *Wasting Time by the Truckload.*

Lieutenant Commander Gordon W. Bengtson, Supply Corps, United States Navy, is in charge of the Navy Central Freight Control Office at the Naval Supply Center, at Oakland, California, which carries "hundreds of thousands" of items.

Commander Bengtson thus enumerated the various burdens that the application of Sec. 530, as amended, would place upon his office:

> "We would be required to ship under the rates established under the PUC minimum. . . . We would be required to classify every item in the shipment. . . . A shipping activity went through the process of completely classifying a shipment, a 40,000 pound truckload shipment, and approximately 13 hours were expended, 13 man hours were expended in complete classification of all the items in this truckload shipment."

The naval officer expressed the opinion that a delay of that sort might be crucial for operational purposes in the Navy. He said:

> "If we were required to meet a deadline to ship material to ships operating where it would be required we ship on very short notice, those additional hours required to completely classify the shipment might result in a delay in meeting that deadline."

Commander Bengtson commented that such a delay might result in the ship's leaving port without the item on

board," or, if the item was important enough, it might result in the ship's not sailing.

If "this new rate structure" went into effect, the personnel in his organization would have to be increased "approximately 50 per cent", Commander Bengtson said. The 13 additional hours required to classify completely the shipment "represents labor costs, and the 13 additional man hours would be approximately $25 a truckload." Bills that his office has already studied, "just through our main channels of traffic, reflect increases [in rates] up to 45 per cent".

Under Navy regulations, the nature, the direction, weight, etc., of shipments of security material for purposes of rate-making could not be revealed, Commander Bengtson said.

On cross-examination, the commander testified that "Where there is any doubt as to the interstate or intrastate nature of a shipment, we utilize carriers that have both operating rights, interstate and intrastate."

(1) *Speed Is of the Essence.*

Colonel Herbert C. Chambers, commanding officer of the Air Force district traffic office at Mira Loma, California—an "office . . . composed of technicians"—expressed the view that State regulation of intrastate shipments of Air Force material between points in California would "definitely" interfere with his mission at Mira Loma.

"I say 'definitely'," he explained, "because we—our logistics system is based on *speed* and we cannot tolerate anything that would interfere with speed. And, as I have

pointed out previously, this Air Force mission is world-wide, and I think every one recognizes the importance that Strategic Air Command has played in present world affairs."

Referring to "security-type shipments", Colonel Chambers testified that "we wouldn't want to reveal the number of shipments that do develop, nor the numbers [number?] of missiles that are involved or the points of origin and destination. We would certainly not . . . want to do it, and we would conceal that in so far as possible."

(m) "*Would Hamper and Hinder*".

Lieutenant Colonel Walter H. Eastham, United States Marine Corps, officer in charge, Marine Corps Fleet Control Office, San Francisco, California, testified that the imposition of the minimum rate classification—the defendant's regulation of rates—would severely hamper and hinder him in carrying out his duties.

"To begin with," he asserted, "it would require a slow-down in our movement of freight. It would cause . . . that the classification would be required. Since our traffic is very unique and different, we have to ship many thousands of different items and in many different directions, and itemwise our IBM stock records indicate that we have approximately 450,000 items in our stock system, control system, that is used to ship to the various activities.

". . . the commodities are very difficult to be continually classified under one group . . . , they are all different, there is an admixture. If we have an emergency shipment it would require us to pay, in my opinion, a higher

charge, and all in all I just think it would cause us considerable inconvenience all the way through."

Colonel Eastham added that the defendant's regulation of rates for the shipment of Marine Corps materiel would increase that service's "freight bill", and that such State regulation would "definitely" interfere with the shipments of secret material "in so far as the classification of equipment, or a requirement for going before the Commission and explaining the type of equipment" is concerned.

There would be difficulty in distinguishing between interstate and intrastate materiel, the Marine Corps officer added.

"However," he continued, "it is our policy that where there is any question as to whether it is interstate or intrastate, we attempt to get carriers that have both rights, even though the charge is greater."

(n) *A Civilian Expert's Viewpoint.*

So far we have considered the testimony of official spokesmen representing the Army, the Navy, the Air Force, and the Marine Corps. It may be helpful now to examine the viewpoint of a representative of the Western railroads, who expedites the handling of freight rate matters for the plaintiff.

We refer to Leonard Hill, of Washington, D.C., who testified that he has been employed "in various capacities by the western railroads for the past 39 years, and [that] most of those years were spent in handling the matter of freight rates for commercial shippers and for the Government."

Mr. Hill agreed with other Government witnesses that "the regulation of rates for the shipment of Government property by State Commissions" would seriously interfere with the plaintiff in the discharge of its responsibilities of supplying the armed services. He also expressed the view that the present system of rate adjustment for the plaintiff is a good one.

"And I would like to add this, if it please the Court", Mr. Hill continued, "The railroads of the United States have had a good deal of experience in the handling of Government freight, and it's a matter of record during World War II 97 percent of the military traffic of the United States moved by rail.

"The present system is based on experience with it, and it fits the needs of the traffic and the needs of the traffic are directly involved with the national defense."

Several other witnesses, both military and civilian, testified on behalf of the plaintiff, but we believe that the individuals quoted above supplied evidence that amply supported the Government position.

(o) *The Case for the Defendant.*

The first of the defendant's three witnesses was Tal Loretz, a self-employed traffic and transportation consultant, familiar "in a general way" with transportation rates in California.

Mr. Loretz testified that there was "need for some interdependence and some type of regulation, if you please, on Government traffic, because it is only a part of the overall traffic movement."

The witness explained that the freight-all-kinds ("f.a.k.") rates in California "have been generally subject to a 20,000 pound load that would be subject to one level of rate, a 30,000 pound load or shipment would be subject to a somewhat lower basis, and either a 36,000 or 40,000 pound load or shipment, which is normally the highest for a truckload movement, is accorded a still lower rate."

Much of Mr. Loretz's testimony was highly technical, being given in part in connection with exhibits showing freight rates and their adjustments in California since 1952.

(p) *"Throwing the Book Out the Window".*

Mr. Loretz expressed himself as opposed to "f.a.k." "as applied to various kinds of moves".

"When you establish a freight-all-kinds rate, you in effect throw the book out the window," he declared. "You say that regardless of whether it's a steel billet or steel bar, on the one hand, or it's a mattress or an airplane wing or something, on the other, that we move them both at the same rate. . . .

"So the carriers have attempted at different times to set up some protection to themselves whereby, whether it be a steel beam or a mattress, why, they could be assured of a certain amount of minimum revenue per loaded mile.

"That is one phase. I have dwelt on that at some length because that is one phase of the deterioration of the California Government- ate structure which cannot be expressed just in figures. . . . my opinion is that the

same rate applicable to the steel beam and the bulky airplane wing is, on its face, *wrong.*"

It is this inequity, Mr. Loretz continued, that makes it necessary "that there should be some regulatory agency which could determine if and when there may be some special conditions to justify freight-all-kinds rates, and if there is any reason for them, to tie them down appropriately so as to avoid a burden being placed on other traffic which the carrier has to move, not only for the Government but for the public at large." He added that the f.a.k. rate has been abused in California.

"I can conceive from the military standpoint," Mr. Loretz explained, "we will say, if an entire division is being moved from one location to another, it might be expedient for both the shipper and the military, as well as the carrier, to just have one rate on military impedimenta, and to take the good with the bad and average it out, so to speak, as any contractor might do in any other field.

"But I would like to point out particularly that your freight-all-kinds rate, as they [sic] have been in effect in California for the past several years, they go 'way beyond that purpose. *They apply on the whole load of steel bars or they apply on a load of mattresses.*

"It isn't a question of balancing your load between the two and avoiding a minute description of the entire shipment. It's a question of a rate which, if it's a good rate for one, it is obviously a bad rate for the other article, all of which is included within that broad description."

(q) *"Only an Impartial Regulatory Body Can Resolve It.'*

By way of summary of this part of his testimony, the traffic expert asserted that freight-all-kinds rates "certainly should be scrutinized most carefully, and I don't know of any one other than an impartial regulatory body that can resolve the problems that have developed here in California through the use and abuse of freight-all-kinds rates."

On cross-examination, Mr. Loretz was asked whether, "in controversial cases, . . . where the normal channels of due process were followed, . . . it would be possible to get a decision out of the [defendant] in less than 30 days". He replied:

> "As to commercial traffic, I would say that 30 days is probably pretty conservative. As to what the Commission might do on military traffic, as you have stated, if there are unusual conditions there, I couldn't say. I am sure they will find the means of meeting that situation, though.
>
> "Q. But so far as you know now, no such rules have been promulgated or proposed?
>
> "A. There are none in effect on commercial traffic."

And on that muted note, Mr. Loretz's testimony ended.

Robert A. Lane, senior rate expert in the defendant's Transportation Department, was the next witness. Much of his testimony was in connection with a three-page typewritten document prepared under his direction by J. P. Haynes, Publishing Agent for all rails in California, and entitled "Pacific South Coast Freight Bureau Tariff No.

300, Cal. P.U.C. No. 102", etc. The exhibit was designed to show commodity rates between principal California shipping points, and covered items ranging from cable to canned goods, and from soap to sinks. Even at that, however, Mr. Lane testified that "these are a very, very small portion of the commodity rates in California. There are literally thousands of them."

Soap is a "heavy-moving commodity", Mr. Lane believed, and he included it in his list also because "certainly it is a commodity the military uses, and I wanted to show that we have commodity rates for commercial business for a general commodity such as that."

"One of the further purposes of this exhibit," Mr. Lane testified, is to combat the alleged inference that "there were no commodity rates in California available for the movement of traffic."

"The class rates, yes, they move c.l. traffic and carload traffic," Mr. Lane conceded, "but I think volumewise the class rates move only about a third of the traffic weightwise."

(r) *The "Piggyback" Plan.*

The witness told of the "piggyback" system—"a movement of the rail traffic in a trailer, an automotive vehicle trailer of a subsidiary of the rail carrier."

"The vehicle body, the trailer," he explained, "picks up the shipment, is loaded in there with use generally of the driver, and it is hauled to a rail yard where it is loaded on a flat car. . . . The trailers on flat cars are hauled over the rail lines to the terminal area, and in the terminal

area they are unloaded and delivery is made from the trailer."

Mr. Lane stated that under California law motor vehicle carriers are at liberty to charge the rates that appeared in the rail tariff shown in his exhibit.

James W. Mulgrew, Director of the Transportation Division of the defendant, was the final witness. After reviewing the history of regulation of transportation in California since 1911, Mr. Mulgrew stated that for many years certificated carriers in California had the "unqualified right" to charge reduced rates for the plaintiff. This applied to "fixed terminal carriers and to the railroads," but not to "the highway contract or radial highway common carriers, who had no such right."

The defendant's transportation chief stated that he knew of no reason why commodity rates for the movement of Government traffic could not be granted "with the proper showing". He added that he saw "no reason" why regulation by the defendant "should necessarily cause delays".

(s) *"Rates Could Be Made Effective Retroactively"*.

"In view particularly of the fact that there is no competition that I know of between the Government and individual shippers at all likely, I should think that the rates could be made effective retroactively much as they are done—much as they are made under the present system.

. . .

"Now, the second point that I have, on delays, is the difficulty of classification of commodities where large numbers of different items are included in a lot. If I followed

the testimony of the Government witnesses correctly, it seems to me that that rests on a misconception. It's not necessary under our system of rates that the particular freight for a particular truck be segregated and rated as one shipment. You can make the tender of the entire lot, whether it be one truckload, ten truckloads, or a hundred truckloads, as one shipment, and the lowest truckload rates will apply to the entire string of trucks, regardless of how the category may be stowed in particular trucks.

"So . . . if I followed the testimony correctly, I don't see that there should be any delay attributable to rating, . . ."

On the subject of security, Mr. Mulgrew testified that the only thing that he could see to do "is to exempt that by some sort of a general order of the Commission, exempting the traffic from minimum rates or any sort of rate establishment upon certification by a competent military authority that this is restricted traffic, or secret traffic." He added that he would be prepared to recommend that sort of an order to the defendant.

(t) *Unregulated Rate Making "Creates the Opportunity for Abuses".*

Mr. Mulgrew testified that letting carriers be free to quote rates to the plaintiff "creates the opportunity for abuses that would not be present if there were some *screening*, shall we say, of the Government rates." The witness referred to General Lasher's reference to that as an "abuse", and added:

"The danger, as I see it, is that * * * if rates get below cost, any rates, Governmental rates or com-

mercial rates, the carriers can't long survive, or they will have to offset the unremunerative traffic with higher than necessary rates on other traffic.

"There is a situation here, I think it is peculiar to California, where the carrier making the contract with the shipper in turn hires some other carrier to do the actual hauling. That transaction between the two carriers is not regulated ratewise except in the case of dump truck traffic, and so these carriers, called independent subcontractor haulers, may take freight at less than remunerative rates in order, as one witness said, to get 'gas money'. . . . There are some 15,000 of these permit carriers, many of them driver-owner operators."

The witness added that Sec. 530, as amended, does not require public hearings, and that it will be possible for the defendant to set up certain procedures for expediting requests by carriers or by the plaintiff itself with respect to the plaintiff's traffic.

"We have emergency situations that arise in commercial traffic and they are taken case of," Mr. Mulgrew commented.

On cross-examination, counsel for the plaintiff read from the defendant's "excellent report for the year 1954-1955" showing that the trucking industry for that fiscal year had a gross revenue of $550,730,134, "an all-time high".

Regardless of what might be happening in particular instances in the Government traffic, Mr. Mulgrew agreed that the trucking industry in California "as a whole is one that is sound," adding:

"I think we have a very adequate transportation system and in reasonably good financial health."

Counsel for the plaintiff introduced the defendant's report, saying:

> "In a Constitutional question of this sort we balance the needs of the State regulation and balance against that the harm that would actually be done to the Federal Government in the carrying on of its Constitutional responsibilities on a national scale, and for that reason it seems to be very pertinent to know whether the situation here in California as a whole demands any drastic action at this time."

Of the 15,500 trucking companies in California that are authorized to carry Government traffic, about 500 are certificated—"common carriérs in the sense that they must serve all who tender them traffic within the limit of their common carrier undertaking", Mr. Mulgrew stated.

(u) *Defense Counsel Stipulates.*

Immediately before both parties rested, Judge Everett C. McKeage, chief counsel for the defendant made the following unilateral stipulation:

> "I will stipulate that I will officially advise the Public Utilities Commission that it has lawful authority pursuant to Sec. 530 . . . and other provisions of [the Public Utilities] Code, to authorize any carrier to negotiate with the United States with complete freedom concerning the transportation of any property of the United States which may involve security matters, provided only that the carrier require a certificate from a responsible Federal official, which certificate shall be filed with the Commission, that such transportation involves security matters; and in my opinion, such advice will be accepted by the Commission and acted upon.

> "I further stipulate that I will officially advise the . . . Commission that it has authority pursuant to Sec. 530 . . . and other provisions of said Code to grant any and all lawful authority requested under said section of said Code without the necessity of a public hearing, and grant such authority effective immediately, and that such advice will be accepted and acted upon."

Judge McKeage then cited some law to the effect that the Commission "may make its orders effective immediately," and repeated that he would so advise the defendant, "and in my opinion they will accept and act upon" such advice.

7. *This Court Has Jurisdiction Over the Subject Matter of the Complaint.*

In a 54-page brief, with voluminous appendixes, the defendant argues that this Court should sustain the motion to dismiss. It would unduly lengthen an already lengthy opinion to discuss in detail the defendant's many contentions, some of which overlap. We have carefully considered each point, and will review the principal ones briefly.

The first major attack upon the complaint is that it fails to show that this Court has jurisdiction over its subject matter. Seven separate grounds are set forth for this contention. We will glance at each.

(a) *The Complaint Describes an "Actual Controversy".*

The defendant asserts that the complaint "does not allege an 'actual controversy' within the meaning of

[28 USCA Sec. 2201]; and the plaintiff therefore is not entitled to a declaratory judgment". We have already fully summarized the complaint and the evidence adduced in its support: no unbiased reader of the record can fail to see that a real and pressing controversy does exist between the parties. We have also set out the salient provisions of Sec. 530. Sections 2110-2112 provide fines and imprisonment for violations of the Public Utilities Act. If a United States officer were to negotiate with a carrier for "reduced rates" without permitting the defendant to determine whether it "considered" the conditions of the contract "just and reasonable", he could be thrown into the county jail. He at least would speedily be convinced that there existed a "controversy" between his Government and the State of California!

The defendant cites Public Service Commission of Utah v. Wycoff Co., 1952, 344 U.S. 237, and Public Utilities Commission of California v. United Air Lines, 1953, 346 U.S. 402. We believe that neither case is in point. In *Wycoff*, the plaintiff sought a declaratory judgment that its carriage of motion picture film and newsreels between points in Utah constituted *interstate* commerce, and that the Public Service Commission of Utah should be forever enjoined from interfering with such transportation over routes authorized by the Interstate Commerce Commission. *The plaintiff specifically disavowed any attack upon the constitutionality of any Utah statute or the validity of any order of the State Commission.* 344 U.S. at pages 239-240. The Supreme Court held that the suit could not be maintained. In *United Air Lines*, the controversy centered around the question of whether air transportation

between Santa Catalina Island and the mainland of California was subject to the jurisdiction of the present defendant or to the Civil Aeronautics Board of the United States. A three-judge District Court held that the United Air Lines, Inc., was entitled to a decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the plaintiff air line. There, again, there was no question of the constitutionality of a State statute. The Supreme Court reversed, on the authority of *Wycoff*. Neither case aids the present defendant.

(b) *The Plaintiff Was Not Obliged to "Exhaust" Any "Administrative Remedy" by Instituting a Proceeding Before the Defendant.*

In the instant suit, the plaintiff does not question the propriety of an act of the defendant, but asserts that sec. 530 is unconstitutional in so far as it purports to authorize the defendant to regulate the rates for the carriage of the plaintiff's goods. The defendant contends that "the plaintiff has failed to exhaust the administrative remedy available to it," and cites six Supreme Court cases as supporting that statement. We have examined each of those six decisions, and find that *not one dealt with the constitutionality of a State statute.*

On the contrary, in Panitz v. District of Columbia, C.A., D.C., 1940, 112 F. 2d 39, 41, Associate Justice Vinson of the Court of Appeals for the District of Columbia, and later Chief Justice of the United States, cautioned against permitting administrative agencies to pass upon the constitutionality of statutes. The learned jurist said:

"Did the assessor, as an administrative official, have inherent power to rule on constitutional objections to the tax? It has been said that the necessities of our system require the *judiciary* to determine the constitutionality of Acts of the legislature. There can be little doubt that it represents the highest exercise of judicial power, and one that even the judiciary is reluctant to exercise. Interruption of the machinery of government necessarily attendant on this function not only cautions the judiciary *but argues as well against its exercise by other agencies.* It is this consideration for the orderly, efficient functioning of the processes of government which makes it impossible to recognize *in administrative officers any inherent power to nullify legislative enactments because of personal belief that they contravene the constitution.* Thus it is held that ministerial officers cannot question the constitutionality of the statute under which they operate. Likewise, it has been held that an administrative agency invested with discretion has no jurisdiction to entertain constitutional questions where no provision has been made therefor. In respect to taxation it is frequently stated that one need not pursue his administrative remedy where the tax is void. *Here again is apparent a reluctance to invest non-judicial agencies with jurisdiction to rule on the validity of statutes.*" [Emphasis supplied.]

(c) *The Complaint Is Not Bottomed Upon a Ground That Is Within the Primary Jurisdiction of the Defendant as an Administrative Agency.*

The defendant claims "primary jurisdiction" in this case on the ground that the complaint recites that "Since time would be of the essence, it would be impossible to

obtain Commission approval of rates and, accordingly, shipments by the United States would be thrown into the class rate, which as applied to such shipments is recognized as unrealistically high,'" etc. From this recital the defendant seeks to spell out jurisdiction for itself, because "this allegation calls for a determination of whether or not 'class rates' covering such shipments are 'unrealistically high' because of certain alleged peculiar characteristics of such shipments". It is therefore argued that such decision "calls for the exercise of an informed administrative judgment".

The defendant here overlooks the fact that the gravamen of the complaint is not that the plaintiff would have to pay unrealistically high rates if Sec. 530 were applied to it, but that the section is void under Article VI, Section 2 of the Constitution in that:

> "1. For no valid reason within the police powers or other reserved powers of the State of California, [Sec. 530 and related sections] place an unreasonable burden and impediment on the United States in the discharge of its constitutional powers and responsibilities under Article I, Sec. 8, Clauses 7, 12, 13, 16 and 17, and Article IV, Section 3, Clause 2, of the Constitution of the United States."

Thus it is clear that this action is based upon the *unconstitutionality* of Sec. 530, principally because it interferes with the plaintiff's discharge of its Constitutional powers and duties relating to the raising and the support of "Armies and a Navy". The first sentence of Article I, Section 8 of the United States Constitution gives Congress the power to "provide for the common Defense and gen-

eral Welfare of the United States." How the application of Sec. 530 would "hamper and hinder" the plaintiff in carrying out its Constitutional functions has been clearly shown by the testimony of high-ranking officers of the armed services. This "hampering and hindering" is not principally the result of the application of "class rates". The Constitutional objection, as we have seen, goes far deeper than that.

It is well settled that a state statute which places an unreasonable burden upon the discharge of a Federal function is unconstitutional.

Nearly a century and a half ago, Mr. Chief Justice Marshall laid down this fundamental principle, which he observed "may be almost termed an axiom". In M'Culloch v. The State of Maryland, 1819, 4 Wheat. 316, 426-427, the great jurist said:

> "This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them.
> * * *
>
> "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution."

And, in connection with Judge McKeage's solemn avowal, *supra*—an avowal in which we have the utmost

confidence—we can only say, in the words of Mr. Chief Justice Marshall in this same opinion, "This, then, is not a case of confidence." 4 Wheat. at page 431.[2]

(d) *By Its Plain Terms, the Johnson Act Does Not Apply To This Case.*

The defendant contends that the Johnson Act, quoted in full, *supra,* prohibits this Court from granting the relief requested by the plaintiff. We are somewhat surprised that learned counsel seriously urges this point, in view of the fact that *four* conditions to the application of the Act are specified therein, *all* of which must concur, and each of which relates to an order, not a *statute*. Since the conjunction "and" is used as the connecting word between the conditions, it is clear that all four contingencies must be present before the Act can apply.

The very first statutory condition at once makes the Johnson Act inapplicable here; for it sets forth that it comes into play only when "Jurisdiction is based *SOLELY* on diversity of citizenship *or* repugnance of the *ORDER* to the Federal Constitution." [Emphasis supplied.] In the instant case, the jurisdiction of this Court is based principally upon the unconstitutionality of a *statute*, not of an "*order* . . . made by a State administrative agency or a rate-making body," etc.

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[2]See also Osborn v. Bank of the United States, 1824, 9 Wheat. 738, 870; Weston v. City Council of Charleston, 1829, 2 Pet. 449, 468; Ohio v. Thomas, 1899, 173 U.S. 276, 283; *Re* Heff, 1905, 197 U.S. 488, 505; Johnson v. Maryland, 1920, 254 U.S. 51, 55-57.

(c) *The Other Grounds of the Defendant's Attack Upon the Jurisdiction of This Court.*

The remaining attacks upon the jurisdiction are somewhat related, and will be considered together briefly. They are:

(1) The plaintiff will not suffer irreparable injury in the absence of injunctive relief, but has an adequate remedy elsewhere.

(2) The Court is required by law to abstain from granting the relief requested in order to preserve comity between the plaintiff and the State of California.

(3) The subject matter of the complaint is within the exclusive jurisdiction of the State of California.

(1) We have fully summarized the allegations of the complaint. For the purposes of the motion to dismiss, they must be taken as true. The single allegation that the enforcement of Sec. 530 "would greatly impede the discharge by the United States of its constitutional powers and responsibilities by inevitably causing delays in such shipments when time is of the essence and in many situations would expose to the public "patterns of movement," etc., of itself spells out one ground for equitable intervention. We are here dealing not chiefly with considerations of the market place, but with the plea of a constitutional sovereign to be permitted to discharge, without State interference, its duties in connection with its greatest task—the defense of the nation itself.

(2) Similarly, in none of the cases cited by the defendant under this heading was the United States Govern-

ment seeking to have declared unconstitutional a State statute, plain on its face, that by its very terms would subject the Federal sovereign to restrictions and delays in the exercise of its paramount right, power, and duty of providing itself speedily and economically with the engines of self-defense.

(3) The defendant contends that the subject matter of the complaint is within the State's exclusive jurisdiction. But the subject matter of the complaint is California's placing "an unreasonable burden and impediment on the United States in the discharge of its constitutional powers" in connection, as we have seen, with the national defense. We do not believe that national defense is "within the exclusive jurisdiction of the State of California." The plaintiff is not attacking the defendant's *general* power to fix rates: it is merely objecting to a statute that by its terms permits a State Commission to impose "conditions" upon the granting of reduced rates to the Federal sovereign, even when they relate to activities connected with the national defense.

Heavy reliance is placed by the defendant upon the case of Penn Dairies Inc. v. Milk Control Commission of Pennsylvania, 1943, 318 U.S. 261, 270, in which, pursuant to the Pennsylvania Milk Control Law, a renewal of the license of a milk dealer was refused by the Commission because the dealer, in violation of the state law, had sold milk to the United States below the minima fixed by the Commission. It was there held that such application of the State law to the dealer was not precluded by the Constitution or laws of the United States. Justices Douglas, Black, and Jackson dissented.

In the first place, the State regulation imposed "no prohibition on the national government or its officers." They might "purchase milk from whom and at what price they [wished], without incurring any penalty". Here, however, as we have seen, there are penalties that could be imposed upon any officer of the United States who violates the provisions of the Public Utilities Act. Section 2112 provides:

> "Every person who, either individually, or acting as an officer, agent, or employee of a corporation other than a public utility, violates any provision of this part, or fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in such violation or noncompliance, in a case in which a penalty has not otherwise been provided for such person, is guilty of a misdemeanor, and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

But over and beyond this, the *Penn* case did not involve the procurement of the engines of war. There is a constitutional difference between a can of milk and a hydrogen bomb!

8. *The Complaint States a Claim Upon Which Relief Can Be Granted.*

As the defendant itself points out, the section of its brief dealing with jurisdiction discusses "certain deficiencies in the complaint". In discussing other alleged "defi-

ciencies", in addition to those asserted under the jurisdictional heading, the defendant objects that "Most of the allegations are not well pleaded "for one reason or another". [sic] The entire discussion of these asserted "defects" consumes less than one typewritten page, and ends with the following bare statement:

> "When the complaint is stripped of all the allegations that are deficient in one or more of these respects, the only things left are allegations that the California Legislature amended Sec. 530 . . . , and that the application of such amended statute will result in increased cost and expense to the United States in the transportation of its property. Even the second of these allegations is lacking in particularity. Assuming, however, without conceding, that these two allegations are well pleaded, they do not furnish any basis for relief by this Court."

It is clear that this assortment of glittering generalities adds nothing to the legal argument, and that the defendant is relying upon the first section of its brief as expounding the gravamen of its objection to the complaint. The second section contains an extensive vocabulary of adjectives, such as "vague", "ambiguous", "conjectural", and "irrelevant", but does not greatly advance the thought.

9. *Conclusion.*

In a dictatorship, the warlords do not even *demand*—much less *request*—authority to negotiate with private parties for the supply of their war needs. Autocrats *take* what they want!

It is therefore a heartening spectacle, in a Constitutional democracy, to see a group of military men, speaking for the sovereign itself, appear in a civil court to *plead* to be allowed to carry out their Constitutional functions by being permitted to contract freely, with privately-owned carriers to supply the Government's transportation needs.

But this very subordination of the military to the civil power—fundamental in every true democracy—itself imposes a grave responsibility upon civil courts. We dare not, in good conscience and under the Constitution of the United States, deny relief to such a suitor when it proves to our satisfaction that such denial would hamper the national defense.

Such proof the present plaintiff has produced in abundance. We do not believe that a federal court, after listening to such testimony and dispassionately reviewing the record, as we have done, can or should stay its hand when legitimate relief is requested by the armed forces of the nation.

Accordingly, we hold that, in so far as Sec. 530, *supra*, purports to authorize the Public Utilities Commission of California to impose "such conditions as it may consider just and reasonable" upon the granting of reduced rates by commercial carriers in favor of the plaintiff, it is invalid, void and of no effect, as contravening the provisions of the United States Constitution relating to the national defense, *supra*. The defendant is permanently enjoined from enforcing any of the restrictive provisions of Sec. 530 as against the plaintiff. Counsel for the plaintiff will

prepare proposed findings of fact, conclusions of law, and form of judgment, in accordance with this opinion.

Dated this 30th day of April, 1956.

DAL M. LEMMON
United States Circuit Judge

OLIVER J. CARTER
United States District Judge

OLIVER D. HAMLIN, JR.
United States District Judge

United States District Court
For the Northern District of California
Southern Division

United States of America, Plaintiff, vs. Public Utilities Commission of the State of California, Defendant.	Civil Action No. 35101

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action having come on to be heard before the duly constituted district court of three judges established pursuant to Title 28, Sections 2201, 2281 and 2284 of the United States Code, and the defendant having moved to dismiss the action, and full argument having been had on defendant's motion to dismiss on February 9, 1956, and the court having overruled the defendant's motion to dismiss on February 17, 1956, and a full hearing with submission of evidence by the plaintiff and the defendant having been had on the week of March 18, 1956, and counsel for the parties having been heard on April 19, 1956, and the court having filed its opinion herein on

April 30, 1956, now, in accordance with the opinion heretofore filed, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

I.

In order to provide for the common defense, the United States has established throughout the United States and the world a number of installations and establishments, both civil and military, which are integrated into a general nation-wide and world-wide system designed to maintain the country's strategic position in the light of the present world-wide political and military situation. In order to supply the various operational and training establishments, there has been established what is commonly called a depot system, consisting of a number of storage and supply points. The various depots and supply points are integrated into a complex system throughout the world designed to meet the logistical requirements of the defense establishments at any particular time. There is a constant flow of materiel through this system at a velocity and in directions determined by the military needs.

II.

There are approximately 152 military installations of all types situated within the State of California, consisting of depots, training centers, air stations, naval operation bases, research centers, proving grounds, embarkation centers, ammunition magazines, hospitals, and almost every other type of military establishments. In addition to the strictly military installations within the state, Cali-

ornia is the center of the aircraft manufacturing indus-
ies of the country, and the various aircraft manufac-
rers, through contracts with the United States, perform
esearch and experimental work in the development of
rcraft and guided missiles. There is a constant flow of
ateriel of all types from out of the state to the various
stallations within the state, and from the installations
ithin the state to other states. There is likewise a con-
ant flow of materiel from an installation in the state to
nother installation in the state, either for consumption
the destination in the state or for further shipment out-
de of the state. There is a substantial shipment from
orage points within the state to ports for shipment over-
as and for the supply and repair of Naval vessels. Of
0 million dollars expended by the Department of Defense
the fiscal year of 1954 and 1955 for the transportation
materiel, approximately 20 million dollars was expended
r the movement of property from one location in Cali-
rnia to another location in California.

III.

Many items of military materiel are highly secret in
ture and, for security reasons, every effort must be made
limit the knowledge of the character of the items
ipped to as few people as possible. In addition to the
cret character of many of the military items, frequently
e location of a military installation is a matter of secrecy
d materiel routed to these locations must be routed in
ch a way that the ultimate destination is kept secret.
here are a number of such installations in California and
equently shipments are made to such installations.

IV.

Under the doctrine of dispersal as a defense against air attack, the various military installations in California and elsewhere, particularly the depots and supply centers, are usually widely dispersed and an effort is made in their location and function to see to it that the destruction of one facility would not completely disrupt the plan of operation in the event of emergency by creating critical shortages of essential materiel and items of supply. In addition, the depot system and other supply installations are so located that in the event of emergency there will be as little congestion as possible at the various ports and other transit centers, in order that maximum use may be made of the transportation facilities. Likewise, supply points are so located that it is possible to divert materiel from one port to another port on very short notice to minimize the effectiveness of enemy submarine operations. Due to the peculiar requirements of training centers, proving grounds, research centers and firing ranges, they are likewise usually located outside of large areas of population. Thus, due to the peculiar requirements of the establishments related to common defense, their location has little or no relationship to State boundaries or the normal channels of trade or commerce but are fixed by strategic, tactical and logistical requirements.

V.

As a result of the factors set forth above and other factors the pattern of military traffic differs essentially from commercial traffic in many respects. First, military materiel is consumed in military activities and does not

compete in the commercial market with commercial commodities. Secondly, military materiel consists of hundreds of thousands of items, being either weapons of war or related thereto, which have no relation whatsoever to the types of commodities which flow in the channels of trade. Thirdly, due to the peculiar requirements of military operations and activities, it is frequently necessary and desirable to ship a great many diverse items in one shipment or carload. Fourthly, from the nature of military operations and the location of installations, in a great many instances shipments are made to locations which have no relation to the normal flow of commercial traffic. Fifthly, due to the nature of military operations, frequently the necessity for shipment of materiel arises on very short notice, particularly in times of emergency. Sixthly, in many situations, particularly in times of emergency, time is of the absolute essence in making a shipment of materiel. Lastly, many items of military materiel are highly secret and at times must be secretly and circuitously routed for purposes of security.

VI.

Due to the nation-wide and world-wide character of the military establishments and their close interrelation and integration one with the other, a very high percentage of military materiel situated in the depot system and other installations in any State, including California, at any given time, originates from outside of the State, and a very high percentage of such materiel, at any given time, is destined for points outside of the State. Materiel and items in supply which originate in the State, or are destined for points in the State, are mixed indiscriminately

in the depot system and other installations with materiel which originates outside of the State, or is destined for points outside of the State. Due to the high cost of many weapons and other military equipment and the frequent change in design and improvement, an effort is made to keep the stocks and inventory in the depot system and other supply centers as low as possible. Thus, there is a rapid current of materiel flowing through the depot system and the other installations to points of ultimate destination and consumption throughout the several States and overseas. Since in most instances such materiel is to be consumed in military activities which may depend on contingencies which arise from time to time in the world situation, frequently it is impossible to determine at any given time the ultimate destination of such materiel.

VII.

A number of installations and establishments of the United States within California are situated on land which has been ceded by the State of California to the United States and is held by the United States under varying terms and conditions pursuant to the authority conferred upon it by Article I, section 8, clause 17 of the Constitution of the United States. There are frequent shipments of property within the State originating in installations of this type or terminating in installations of this type.

VIII.

Insofar as it is practical under the requirements of defense, it is the policy of the Defense Department to utilize commercial carriers in the transportation of its supplies.

Since the creation of the Federal Government and the establishment of the Armed Services, it has been the practice in the moving of supplies and materiel for the United States by common carrier for duly authorized officers or officials of the United States to negotiate rates for many Government shipments. When the Interstate Commerce Act was enacted in 1887 providing for the publication of uniform tariffs by common carriers in interstate commerce, section 22 provided that the general provisions of the act providing for the publication of uniform tariffs did not apply to shipments for the United States. Since the earliest times, the powers and duties of the officers of the United States to make such special arrangements for the transportation of property applied alike to shipments which were interstate or intrastate so far as geographic termini were concerned.

IX.

In engaging carriers to transport materiel and supplies from one installation in a State to another installation in the same State, it is the policy of the Department of Defense to engage only those carriers which are duly certificated and qualified under the State laws and regulations to operate on the highways of the State between the particular points involved. In the event that it is difficult for the officers arranging the transportation to determine whether or not the particular shipment in fact is interstate or intrastate commerce under applicable doctrines of law, it is the policy of the Department of Defense to engage a carrier which is duly certificated and qualified under the requirements both of the Interstate Commerce Act and the State statutes and regulations.

X.

For many years section 530 of the Public Utilities Code of the State of California expressly exempted transportation of materiel of the United States from the provisions of the statute relating to the filing of tariffs and approval of rates, and for many years shipments were made by the United States between points in California in accordance with the long established general custom of making special arrangements or contracts for such shipments when circumstances so required. In July 1955 the California Legislature amended section 530 of the Public Utilities Code. California Statute 1955, Ch. 1966. This amendment expressly provided that the Public Utilities Commission of California might "permit common carriers to transport property at reduced rates for the United States, State, county or municipal governments, to such extent and subject to such conditions as it may consider just and reasonable."

XI.

Under the normal practice of the Public Utilities Commission of California at least a month has been required for the approval of any rate submitted to it for approval if no person or corporation protested such rate. It has likewise been the practice of the Public Utilities Commission to hold a public hearing in the event that a published rate were protested. Public hearings under this procedure are frequently protracted. At the hearing in the case at bar, the counsel for the Public Utilities Commission stipulated in the record that in the event that section 530 of the Public Utilities Code of California, as amended, were put into effect, he would recommend to the Commis-

sion that such hearings be dispensed with in cases involving the shipment of property for the United States. It was likewise stipulated in the record by the counsel and other responsible officials of the Commission that the Commission's procedure would be administered in such a way that approval of rates proposed by carriers involving shipments for the United States would be expedited.

XII.

Under the theory of rate regulation in California and elsewhere, every common carrier is required to have in existence at all times a published rate to cover the shipment of every known item between every conceivable point. This rate structure is known as the class or "paper rate." Since the channels of commercial traffic are regular and well defined in accordance with the stability of trade, large commercial shippers seldom use the class rate but negotiate rates with the carriers knows as "commercial rates," which are peculiarly suited and adapted to the requirements of the commerce involved. These commercial rates are usually considerably lower than the class rates. Very little commercial traffic moves at the class rate.

XIII.

As previously found, military shipments are frequently made to remote destinations on short notice, and in many situations, particularly in times of emergency, time is of the essence. Due to the character of the commodities and points of origin and destination, from the nature of things, there will be no published commercial rate under which the shipment might be made. As a matter of practice in

times past in situations of this sort, if a shipment were relatively small, the officers of the United States would ship at the class rate. In the event that the density and volume of the particular shipment were large, the officers of the United States, through their power to make special arrangements, will negotiate with the carriers for a rate which would be comparable to a rate established in commercial traffic for a similar shipment. Through flexible procedures now employed by the various military services, rates for shipments of this type can be arranged in a matter of hours, and, if time is of the absolute essence, the shipment might be made and the rate would be arranged retroactively. In negotiating rates in this manner, it is the policy of the Department of Defense to base a negotiated rate on studies of comparable commercial rates. Many shipments of this character are made in the State of California. In the event that section 530 of the Public Utilities Code of California, as amended, is put into effect, making it necessary for special rates for such shipments to be approved by the Commission under present Commission procedures many of such shipments would have to be made at the class rate. In many instances the class rates would be 50% to 100% higher than the commercial rate for shipments of similar character.

XIV.

From the nature of military operations and movements, it is frequently necessary and desirable to ship truckloads and carloads of hundreds of different items for the supply of a unit or division, or the loading of some vessel for a military expedition, or a similar operation. In many

instances these numerous items are segregated into chests and boxes designed to facilitate tactical requirements under field conditions. In shipments of this sort it has been the custom and practice for the officers of the United States to negotiate and arrange a rate for the entire truckload or carload. Such rates are known as "freight all kinds" rates, and shipments are so described in simple form on the bills of lading and other shipping documents. There is no provision in the California Code or regulations for the making of such shipments. Accordingly, in the event that section 530 of the Public Utilities Code is amended to apply to shipments by the United States, this type of arrangement would be abolished. This would make it necessary for the shipping officers to classify the hundreds and thousands of different items used in military operations, to segregate such items in accordance with published tariffs and classifications, to rearrange the boxing and crating of such items in order to meet the classifications and requirements of commercial traffic and fill out voluminous documents. This additional process could cause delays as high as thirteen hours in the shipment of one truckload or carload. In many stiuations a delay of this sort would seriously hamper or disrupt the military mission for which the shipment was made.

XV.

In addition to the fact that the abolishment of the practices of the officers of the United States in negotiating rates for "freight all kinds" on truckload and carload basis would cause undue delays in many situations, it would also invaribly increase the freight rates charged to

the United States in many particular situations. This would result from the fact that many military items, particularly those relating to weapons of war, electronic equipment, and military aircraft, have no counterpart in commercial traffic. Accordingly, in many situations it would be impossible to segregate and ship the various items under any rate other than the class rate. In addition, due to the fact that military items are segregated and arranged in accordance with tactical and logistical requirements, and due further to the fact that under the class rate structure the entire unit of shipment will bear the classification of the highest item in the mass, frequently many military shipments which for tactical reasons cannot be resegregated would be thrown into a very high classification. In many situations, the freight rate for such shipments would be increased by 150%.

XVI.

In the event that it were necessary for the officers of the United States to classify the many items shipped by it prior to shipment, to segregate the items, and in many instances meet the packing requirements customary in commercial shipments, it would be necessary for the shipping agencies of the United States to increase their forces in order to meet the additional administrative burden. In typical situations the increase in personnel would amount to as high as fifty percent. Men who are now free for more direct military service might have to be trained and used for the preparation of documents and the attention to administrative and shipping detail. Not only would the administrative burden be increased on the shipping level,

it would likewise be necessary to increase the personnel to meet the increased administrative load at the higher echelons in the work of review and in auditing the shipping documents.

XVII.

In the event that it is necessary for the officers of the United States to obtain approval of rates for the shipment of military materiel and other Government property by the California Commission, and other state commissions, a great deal of time of skilled personnel would be consumed in commission proceedings. It would become necessary for highly skilled officers in operational functions to consume considerable time in the preparation of exhibits and in testifying before the commission.

XVIII.

In the event that Section 530 of the California Code, as amended, is put into effect, the Commission would have the power to require the officers of the United States to furnish all information and data necessary for it to determine whether or not a rate were just and reasonable. Under this power the Commission might require the furnishing of information of a secret nature relating both to the type and character of the items or materiel shipped or to the destination of the shipment. Revelation of information of this sort to a public body would seriously jeopardize the security of the United States. In addition to the fact that the revelation of specific information of a secret nature would jeopardize the security of the United States, the furnishing of general information to the public utilities commis-

sions of the various states might reveal a pattern of movement which would be subject to interpretation by espionage agents who might gain therefrom vital information for the aid of an enemy. At the hearing in this case, the counsel for the Commission stipulated in the record that in administering Section 530 of the Public Utilities Code, as amended, he would recommend to the Commission that a rule be adopted whereby upon certificate of responsible officers of the United States to the effect that certain information required for rate determination was secret, the Commission would not require the furnishing of the information.

XIX.

Due to the nation-wide and world-wide integration of the depot system and other military installations and the character of the flow of military items and materiel through the depot system, it would be difficult to determine whether particular items shipped from one installation in California to another installation in California were in fact intrastate or interstate in character under applicable doctrines of law. Thus, in many situations officers of the United States would be required to make difficult determinations of law and fact to determine whether or not particular shipments fell within the provisions of Section 530, as amended. In addition, many shipments within the state are made from installations and enclaves over which the United States has jurisdiction. In many situations it would be difficult to determine whether or not such shipments were subject to regulation by the state commission. In addition, the necessity of such determination in many instances would make it

necessary to segregate materiel within the various depots and installations in accordance with its origin or destination, and in making many shipments it would be necessary to segregate materiel put into particular trucks or cars in accordance with its origin or destination. Thus, the necessity of the determination would result in delays, increased man-hours of work on the part of military personnel, friction and possible litigation.

XX.

In the event that a number of states in addition to California assert jurisdiction over the regulation of the rates for the shipment of military materiel, the delays, increased cost of transportation, increased administrative burden and danger of revelation of secret matters might become so great that it might be necessary to redesign and relocate the depot system or to curtail the functions of certain depots for the purpose of bringing about a situation in which most of the shipments of the materiel would be in interstate commerce and therefore not subject to the regulation of state commissions. Such a rearrangement of the depot system would have no rational relation to the logistical principles upon which it is now based and would entail a loss of efficiency in the performance of the functions of the national defense.

XXI.

Sharpe General Depot situated at Stockton, California, is a large general supply depot carrying such supplies as food, clothing, medicine, engineering equipment, tenting, and similar supplies. Normally this depot ships general supplies to the various military installations within the

state and to ports for shipment overseas. The primary mission of the depot, however, is to furnish relief in the event of disaster resulting from earthquake, fire, or flood. Most of the general military supply functions of this depot could be performed efficiently from a general depot located at Ogden, Utah. In the event that the activities of Sharpe General Depot were curtailed, of necessity its capacity to furnish relief in times of disaster would be reduced.

XXII.

Certain installations within the State of California are situated near state boundaries and alternate routes are available for the shipment of materiel from the installations to points within the state, one of which routes would cross state boundaries. In certain situations different carriers are certificated to carry over the different routes. In the event that the regulation by the State Commission resulted in undue delays, increased expense and administrative burden, the officers of the United States charged with the responsibility of routing the shipment of the materiel would choose the interstate route. This would result in some instances in prejudice to carriers and might entail a longer route.

XXIII.

The delays, increased administrative burden, increased expense and the danger to security that would result from the application of section 530 of the Public Utilities Code, as amended, would be multiplied many times in time of war. In the event that a number of the states enacted similar statutes, a serious impediment would be placed on the successful prosecution of the war.

XXIV.

Since the items and commodities shipped by the United States do not compete in commercial markets, there can be no prejudice to persons or localities in the State of California if the United States follows the custom and practice of negotiating rates with the carriers directly for particular shipments.

XXV.

In its brief directed at the defendant's motion to dismiss this action, the counsel for the plaintiff took the position that under the terms of section 2112 of the Public Utilities Code of California officers of the United States in engaging carriers within the state would be subject to criminal prosecution and possible jail sentences and fines for any violations of the Public Utilities Code or regulations of the Commission. At the oral hearing on the motion to dismiss, the counsel for the Commission did not take issue with the interpretation placed on the statute by the counsel for the plaintiff.

XXVI.

All carriers which carry property for the United States within a state at less than published rates do so voluntarily. There are approximately 12,000 carriers within the State of California which have authority to carry property for the United States within the state. Approximately 100 of such carriers actually engage in this traffic regularly. There has been vigorous competition in recent years among the carriers specializing in the carriage of Government property, and there has been some lowering of the general rate level in this particular traffic.

However, there is no evidence of record of any bankruptcy or financial disaster on the part of these carriers. Generally, the transportation industry within the State of California is in a healthy economic condition. The annual report of the Public Utilities Commission of the State of California for the fiscal year 1954-1955 shows an earned gross revenue of $550,730,132 on the part of all carriers. This was an increase of $11,696,720 over the gross revenue for the preceding year. It was an all time high. During this year the United States expended approximately 20 million dollars within the state for transportation from one installation in the state to another. The annual report likewise shows that the fiscal year was one of general freight rate stability.

CONCLUSIONS OF LAW.

I.

The court has jurisdiction over this cause and the parties thereto.

II.

The complaint states a claim upon which relief can be granted.

III.

The complaint describes an actual controversy within the meaning of Title 28 U.S.C. section 2201 which confers upon this court the power to declare the rights and duties of the parties to the action.

IV.

The burden rests upon the plaintiff to establish by clear proof that the pertinent provisions of section 530 of

the Public Utilities Code of California as applied to it are unconstitutional and void as being repugnant to the Federal Constitution.

V.

The evidence of record clearly proves that for no valid reason within the police powers or other reserve powers of the State of California the application of section 530 of the Public Utilities Code of California, as amended, will seriously hamper, delay and endanger the United States in the discharge of its constitutional responsibilities of supplying the Armed Services and providing for the common defense.

VI.

By section 22 of the Interstate Commerce Act, 24 Stat. 387, the Armed Services Procurement Act, 41 U.S.C. section 151(c), the Federal Property Administrative Services Act of 1949, Public Law 1952, 81st Cong., 1st sess., sections 201 and 202, 63 Stat. at page 377, Congress has expressed a general policy that the procurement of transportation services for the shipment of Government property be by contract and special arrangements and not subject to regulation by Commissions and other bodies vested with the power of regulating the rates for the transportation of property generally.

VII.

The regulation of the rates for the shipment of military materiel intrastate by the several States would so drastically hamper and interfere with the officers of the United States in the discharge of their responsibility of

supplying the defense establishments and related activities and would so endanger the security of the United States that State statutes conferring such power upon State regulatory bodies would be unconstitutional and void as contravening the provisions of the United States Constitution relating to the national defense in the absence of any act of Congress. Such State statutes would be valid only upon the condition that Congress enacted a statute expressly authorizing the various States to regulate such rates. See collation of cases in *Morgan v. Virginia*, 328 U.S. 378.

VIII.

The principle announced in *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, has no application to the facts in this case because under the regulation there involved there would be no direct interference with the officers of the United States in the discharge of their responsibilities, and there would be no delays or increased administrative burden and revelation of secret matter in the procurement of the items of supply there involved. Further, the regulation of the price of milk by a State has a relation to the health of the population of the State.

IX.

Since the issue in the instant case is one of the existence of a constitutional power, stipulations by counsel of the State Commission and other officials of the Commission that its regulations will be of such character that any burden on the United States in the discharge of its responsibility to provide for the national defense will be brought to a minimum and that it will not require the

furnishing of secret information in the administration of the statute involved, though made in utmost good faith, are irrelevant. *McCulloch v. Maryland*, 4 Wheat. 316.

X.

Insofar as section 530 of the Public Utilities Code of California purports to authorize the Public Utilities Commission of California to impose "such conditions as it may consider just and reasonable" upon the granting of reduced rates by commercial carriers to the plaintiff and the carrying of its property and materiel, it is invalid, void and of no effect as contravening the provisions of Article I, sec. 8, clauses 11, 12, 13, 16 and 17, and Article IV, sec. 3, clause 2, of the Constitution of the United States.

XI.

In the event that section 530 of the Public Utilities Code of California, as amended, is applied to the plaintiff, it will suffer irreparable injury and it has no adequate remedy at law.

Dated this 5 day of June, 1956.

/s/ Dal M. Lemmon
Dal M. Lemmon
United States Circuit Judge

/s/ Oliver J. Carter
Oliver J. Carter
United States District Judge

/s/ O. D. Hamlin
Oliver D. Hamlin, Jr.
United States District Judge

United States of America,
Northern District of California—ss:

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the annexed and foregoing is a true and full copy of the original findings of fact and conclusions of law, filed June 5, 1956 in Case 35101-Civil, United States of America, Plaintiff vs. Public Utilities Commission of the State of California, Defendant, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at San Francisco, this 20th day of June, A.D. 1956.

C. W. Calbreath,
Clerk.
By Margaret P. Blair,
Deputy Clerk.

United States District Court
For the Northern District of California
Southern Division

United States of America, Plaintiff, vs. Public Utilities Commission of the State of California, Defendant.	Civil Action No. 35101

JUDGMENT.

This case having come on for final hearing, and the court having filed its opinion on April 30, 1956, and findings of fact and conclusions of law having been filed this day, now therefore in accordance with the opinion and findings of fact and conclusions of law it is ordered, adjudged and decreed:

1. Insofar as section 530 of the Public Utilities Code of the State of California purports to authorize the Public Utilities Commission of California to impose "such conditions as it may consider just and reasonable" upon the granting of reduced rates by commercial carriers in favor of the United States, it is invalid, void and of no effect as contravening the provisions of Article I, section 8, clauses 11, 12, 13, 16 and 17, and article IV, section 3, clause 2, of the Constitution of the United States.

2. Defendant Public Utilities Commission of the State of California and its agents and employees are hereby

permanently enjoined from taking any action or issuing any orders which would interfere with the United States and the various carriers in the State of California from entering into special arrangements with respect to rates for the transportation of property of the United States.

Dated this 5 day of June, 1956.

/s/ Dal M. Lemmon
United States Circuit Judge
/s/ Oliver J. Carter
United States District Judge
/s/ O. D. Hamlin
United States District Judge

Endorsed: Filed June 5, 1956, C. W. Calbreath, Clerk.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

C. W. Calbreath,
Clerk, U. S. District Court
Northern District of California.
By Margaret P. Blair,
Deputy Clerk.

Appendix "B"

U. S. CONSTITUTION

Article I

Section 8

The Congress shall have Power * * *

[cl. 3] To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;

* * * * * * * *

[cl. 7] To establish Post Offices and post Roads;

* * * * * * * *

[cl. 11] To declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[cl. 12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[cl. 13] To provide and maintain a Navy;

* * * * * * * *

[cl. 16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[cl. 17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be for the Erec-

tion of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—and

[cl. 18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article IV

Section 3

[cl. 2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Article VI

[cl. 2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Appendix "C"

Federal Statutes

28 U.S.C. Sec. 1342 (62 Stat. 932)

The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. Sec. 2201 (68 Stat. 890)

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States and the District Court for the Territory of Alaska, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

49 U.S.C. Sec. 22 (58 Stat. 751)

Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced

rates for the United States, State, or municipal governments * * *

41 U.S.C. 151

"The provisions of this chapter shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds."

* * * * * * * *

"(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

"(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

"(2) the public exigency will not admit of the delay incident to advertising;

* * * * * * * *

"(10) for supplies or services for which it is impracticable to secure competition;

* * * * * * * *

"(17) otherwise authorized by law."

40 U.S.C. 471

"It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for (a) the procurement and

supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, specifications, property identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government personnel and property by motor vehicle within specific areas, management of public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures, and representation before Federal and State regulatory bodies; (b) the utilization of available property; (c) the disposal of surplus property; and (d) records management."

40 U.S.C. 481

"(a) The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned—

* * * * * * * *

"(4) with respect to transportation and other public utility services for the use of executive agencies, represent such agencies in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities before Federal and State regulatory bodies; *Provided*, That the Secretary of Defense may from time to time, and unless the President shall otherwise direct, exempt the Department of Defense from action taken or which may be taken by the Administrator under clauses (1) - (4) of this subsection whenever he determines such exemption to be in the best interests of national security."

Appendix "D"

Decision No. 51047

Before the Public Utilities Commission
of the State of California

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers relating to the transportation of general commodities (commodities for which rates are provided in Highway Carriers' Tariff No. 2).	Case No. 5432 Petition for Modification No. 34

Edward M. Berol and *Lewis Clark*, for California Government Traffic Conference, petitioner.

J. C. Kaspar, for Motor Truck Association; *L. E. Osborne*, for California Manufacturers' Association; *Arlo D. Poe*, for Motor Truck Association of California; *T. A. L. Loretz*, Tariff Agent; *J. L. Beeler*, for Southwestern Motor Tariff Bureau; *Maurice A. Owens*, for Draymens Association of Alameda County, Pacific Motor Tariff Bureau; *H. L. Mathewson*, for Pacific States Motor Tariff Bureau; *A. F. Schumacher* and *P. N. Kujachich*, for Owens-Illinois Glass Co., Pacific Coast Division; *Jess E. Francis*, for Continental Freight Lines; *C. R. Nickerson*, for Pacific Coast Tariff Bureau; *Harry Marioneaux*, for Alves Service

Transportation Co., All-State Transportation Co., and J. A. Nevis Trucking Inc.; *Graeme Perton*, for Constructors Transport Co.; *Harold F. Culy*, for Culy Transportation Co., Inc.; *E. J. Muzio*, for Miles & Sons Trucking Service and Miles Motor Transport system; *John W. Smith*, for Southern Pacific Company and Pacific Motor Trucking Company; *James E. Doyle*, for Doyle Draying Co.; *W. J. Pope*, for Aetna Freight Lines; *Peter Vinick*, for Lodi Truck Service and *Walter Alves*, for All-State Transportation Co., Inc.; and Alves Service Transportation Inc., interested parties.

Clement T. Mayo, Commerce Counsel, Bureau of Supplies and Accounts, Department of the Navy, for the Department of Defense.

J. A. McCunniff, of the Commission's staff.

OPINION

On June 3, 1954, petitioner California Government Traffic Conference filed Petition for Modification No. 34 in Case No. 5432 seeking to eliminate from Item No. 20 Series of Highway Carriers' Tariff No. 2 (now Minimum Rate Tariff No. 2) the paragraph reading as follows:

> "Radial highway common carriers, highway contract carriers and household goods carriers may deviate from the minimum rates named in this tariff in connection with the transportation of property for the armed forces of the United States."

On June 17, 1954, said petition was amended to provide that instead of eliminating the above-quoted paragraph it be amended to read as follows:

"Radial highway common carriers, highway contract carriers and household goods carriers may deviate from the minimum rates named in this tariff in connection with the transportation of property for the armed forces of the United States, *to the extent necessary to meet the rate of a common carrier on file for use with the armed forces of the United States, pursuant to Section 530 of the Public Utilities Code.*"

(Italicized portion constitutes addition.)

Public hearings were held before Examiner Wilson E. Cline at San Francisco on November 3, 4 and 5, 1954. The matter was taken under submission upon the filing of certain exhibits November 12, 1954.

California Government Traffic Conference is an association of all classes of highway carriers engaged in the transportation of property for the armed forces of the United States. Exhibit No. 13 lists its members as follows:

Aetna Freight Lines, Anaheim Truck & Transfer Co., Arrowhead Freight Lines, Ltd., Asbury Transportation Co., Bigge Drayage Co., California Cartage Company, Inc., Citizens Transportation Company, City Messenger Air Express Co., Coast Counties Express, Constructors Transport Co., Continental Freight Lines, Delta Lines, Inc., Doyle Draying Co., Empire Transportation Company, Fortier Transportation Company, Chas. P. Hart Transportation, Lodi Truck Service, Miles & Sons Trucking Service, Miles Motor Transport System, Northern Transportation Co., Oregon Nevada California Fast Freight, Inc., Orr Tank Lines, Pacific Freight Lines, Paxton Truck Co., Sacramento Freight Lines, Inc., Sullivan Trans-

portation Co., Valley Motor Lines, Inc., Ventura Transfer Co., Victorville-Barstow Truck Lines, Warren Transportation Company and Western Transportation Company.

The paragraph in Item No. 20 Series of Minimum Rate ariff No. 2 which petitioner is requesting to be modified as incorporated in said Item No. 20 Series by Decision o. 42031, dated September 14, 1948, in Case No. 4808. said Decision, 48 Cal.P.U.C. 237,239, the Commission ated:

"From the evidence of record it is apparent that radial highway common, highway contract and city carriers are disadvantaged by the statutory privileges accorded only to common carriers in the transportation of government traffic. An equal opportunity to compete freely from a minimum rate standpoint for the movement of competitive government shipments should be accorded all classes of carriers."

As justification for the proposed modification petitioner leged in the amended petition herein:

"Certain permit carriers have taken liberal and literal advantage of the * * * equal opportunity to compete freely from a minimum rate standpoint for the movement of competitive government shipments * * *. In doing so they have driven rates for the handling of such government shipments to a depressed and unreasonably low and unlawful level. Your petitioner is informed and believes, and upon such information and belief alleges, that the government is the largest single shipper of commodities moving between points in the State of California. That carriers handling such traffic at unduly low and

depressed rates are creating chaotic transportation conditions in the movement of such goods. That such practices are having a depressing influence upon the revenues of the carriers, and if they continue can only result in creating a burden upon other traffic. That the public interest and the preservation of a sound minimum rate structure requires that such practices be stopped and that the privilege accorded by Decision No. 42031 be discontinued."

In support of certain of these allegations, petitioner introduced evidence through various carrier and tariff agent witnesses.

The record does not show that the rates of any of the permit carriers for the handling of government shipments are unlawful, but it does support a finding that certain permit carriers have driven rates for the handling of such shipments to a depressed and unreasonably low level, thereby creating chaotic transportation conditions in the movement of such goods. Such depressed and unreasonably low rates for government traffic are depressing the revenues of the carriers now and previously engaged in handling such traffic and if continued will create a burden upon other traffic.

No evidence was introduced to show that the government is the largest single shipper of commodities moving between points in California, but the record does show that the volume of this traffic is very substantial.

The record further shows that various common carriers and permitted carriers represented at the hearing are willing to continue to offer to the government the freight (all kinds) rates in accordance with the formula arrived

at through negotiation between the representatives of the government and the carriers.

The Commission staff witness made a brief statement respecting the administrative significance of petitioner's proposal. He pointed out that the Commission has previously held in Decision No. 20328, dated October 15, 1928, 32 CRC 296,307, that common carriers are not required to file with this Commission rates quoted under Section 530 of the Public Utilities Code for transportation for the United States, state, county, or municipal governments. In the absence of a filing of such quotations with this Commission practical difficulties will be experienced both by the Commission and its staff and the carriers and the public in ascertaining those quotations which are below the level of the minimum rates otherwise established in Minimum Rate Tariff No. 2.

The Commission staff witness also pointed out a further difficulty. The proposal of the petitioner would place a restriction on the ability of highway permit carriers to initiate lower rates thus leaving the entire initiative to the common carriers. In those instances where closed bids were filed with the government a common carrier could bid below the established minimum rate whereas a highway permit carrier could not safely do so.

In order to meet the administrative problems posed by the Commission staff witness, petitioner suggested (1) that common carriers be required to file copies of their rate quotations governing the transportation of the property for the armed forces of the United States in the same manner that is specified in Tariff Circular No. 2 and General Order No. 80, and (2) that permit carriers

be required to show on their freight bills the source of any rate extended to the armed forces which is below that specified in Minimum Rate Tariff No. 2.

The record shows that the armed forces are required to ship goods via the carriers which offer them the lowest rates. Where several carriers offer the same rates the business is allocated among them on an equitable basis after a review of the schedule of facilities listed by each of the carriers.

Clement T. Mayo, Commerce Counsel representing the Department of Defense, stated the position of Department of Defense as follows:

> "Our position as stated in the opening of the proceeding is that we are appearing as our interests may appear. We are not, based on the evidence that has gone in so far, opposed to the petition as it now stands. We certainly will be opposed to the petition as it was originally filed. Our position in these proceedings and the position we have taken through all the proceedings that we have been in in rate matters is that the Department of Defense is in agreement with the National Transportation Policy as declared by the Congress of the United States and is in favor of reasonable rates on a stabilized basis, and of a sound transportation system to meet the needs of commerce in the national defense. Healthy competition is the life of trade and desirable, particularly in the transportation field. But unethical competition can be extremely detrimental to the industry and can seriously hamper the type of transportation service that is imperative to the defense of our nation and for the waging of war. The Department of Defense seeks rates and rate adjustments only after a thor-

ough analysis of the rate-making factors surrounding the particular transportation involved and after it determines that the existing rates are excessive based on sound rate-making principles and the circumstances of the instant case * * *."

Witness Alves who is president of Alves Service Transportation, Inc., and All-State Transportation, two of the carriers whose volume of governmental traffic has recently been increased by reason of the lowering of rates, stated that he thought the modification of Item No. 20 Series as proposed would be a very fine thing providing there was enough competition in the common carrier field to serve the military bases. Mr. Marioneaux engaged in extensive cross-examination of petitioner's witnesses throughout the hearing and at the conclusion stated that he concurred basically in Mr. Alves' statement. He further stated that he was fully in accord with some corrective measure that would establish minimum rate charges for government traffic as well as for commercial traffic but that he did not believe that the granting of the petition was the proper manner in which to achieve such objective. Mr. Marioneaux suggested that the Commission give this matter further study particularly with respect to assuring the government that there will be a multiplicity of common carriers serving the routes over which military freight is transported.

All other carrier participants in the proceeding, the tariff agents, the California Manufacturers' Association and the Los Angeles Chamber of Commerce were in favor of the modification of Item No. 20 Series as proposed.

The record shows that in those cases where closed bids are sought from carriers and a contract for transportation is awarded by the government to the low bidder it would be manifestly unfair not to allow permit carriers to bid for the business on the same basis as common carriers. If notice of quotations filed by common carriers with the armed forces is given to permit carriers through the filing of such quotations with this Commission prior to their effective date, the permit carriers can compete on an equal basis with the common carriers without the necessity of their being authorized to initiate quotations below the minimum rates specified in Minimum Rate Tariff No. 2. The manner in which quotations from carriers are sought by the armed forces is a matter within the discretion of the armed forces, however.

We hereby find that radial highway common carriers, highway contract carriers and household goods carriers should be permitted to deviate from the minimum rates specified in Minimum Rate Tariff No. 2 only to the extent necessary to meet a lower common carrier quotation to the armed forces of the United States providing said armed forces give notice to this Commission that they require common carriers to file such quotations with this Commission prior to their becoming effective. Otherwise there should be no limitation on the right of such permit carirers to deviate from said minimum rates in connection with transportation of property for the armed forces of the United States. There is nothing in this record to indicate whether the armed forces of the United States will require common carriers to file such quotations with this Commission and in the absence of such showing we

will not at this time revise the third paragraph of Item 20 Series. However, upon the filing of a supplemental petition for modification herein by the California Government Traffic Conference stating that the armed forces of the United States propose to require common carriers to file with this Commission quotations for the intrastate carriage within California of property for the armed forces of the United States and attaching to said supplemental petition a written statement from the armed forces of the United States expressing such intention, this Commission will issue a supplementary order hereto revising the third paragraph of Item 20 Series to read as set forth in Appendix "A" attached hereto.

ORDER.

Based upon the evidence of record and upon the conclusions and findings contained in the preceding opinion,

It Is Hereby Ordered:

1. That at any time within six months from the date hereof, petitioner California Government Traffic Conference may file a supplemental petition for modification pursuant to the views and suggestion set out in the above opinion, whereupon this Commission will issue a supplemental order herein revising the third paragraph of Item 20 Series of Minimum Rate Tariff No. 2 to read as set forth in Appendix "A" attached hereto and made a part hereof.

2. In the event such supplemental petition for modification is not filed within six months from the date hereof, that Petition for Modification No. 34 be denied without further order of this Commission.

This order shall become effective twenty days after the date hereof.

Dated at Los Angeles, California, this 25th day of January, 1955.

Peter E. Mitchell
President
Justus F. Craemer
Ray E. Untereiner
Matthew J. Dooley
Commissioners

Certified as a true copy
Noel Coleman
Assistant Secretary
Public Utilities Commission
of the State of California.

APPENDIX "A"

(Revised Paragraph 3 of Item 20 Series
Minimum Rate Tariff No. 2)

Radial highway common carriers, highway contract carriers and household goods carriers may deviate from the minimum rates named in this tariff in connection with the transportation of property for the armed forces of the United States only to the extent necessary to meet a lower rate of a common carrier for the transportation of said property providing the armed forces of the United States notify this Commission in writing that common carriers are required by them to file such common carrier rates with this Commission in a form acceptable to the Commission, and generally in conformance with the provisions of Tariff Circular No. 2 and General Order No. 80 governing the construction and filing of common carrier tariffs. Radial highway common carriers, highway contract carriers and household goods carriers deviating from the minimum rates named in this tariff pursuant to this paragraph shall make reference on their bills of lading to the common carrier rates on file with this Commission which constitute the authority for such deviation.

In the event the armed forces of the United States do not notify this Commission in writing that common carriers are so required to file such rates with this Commission or revoke any such notice previously given, radial highway common carriers, highway contract carriers and household goods carriers may deviate without limitation from the minimum rates named in this tariff in connection with the transportation of property for the armed forces of the United States."

Appendix "E"

Decision No. 51832

Before the Public Utilities Commission
of the State of California

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers relating to the transportation of general commodities (commodities for which rates are provided in Minimum Rate Tariff No. 2).	Case No. 5432

SUPPLEMENTAL OPINION AND ORDER.

Decision No. 51831, in this proceeding, issued today, pointed out that amendment of Section 530 of the Public Utilities Code, effective September 7, 1955, changes the conditions under which common carriers may transport property for the United States, state, county or municipal governments. That decision further found that, in view of this statutory change, the rule in Item 20 of Minimum Rate Tariff No. 2, allowing highway permit carriers to deviate from the minimum rates in connection with the transportation of property for the armed forces of the United States, should be canceled.

Therefore, good cause appearing,

It Is Hereby Ordered that Minimum Rate Tariff No. 2 (Appendix "D" of Decision No. 31606 as amended) be

and it is hereby further amended by incorporating therein, to become effective September 7, 1955, First Revised Page 12-A cancels Original Page 12-A, which revised page is attached hereto and by this reference made a part hereof.

In all other respects said Decision No. 31606, as amended, shall remain in full force and effect.

This order shall become effective September 7, 1955.

Dated at San Francisco, California, this 16th day of August, 1955.

Peter E. Mitchell
President
Justus F. Craemer
Ray E. Untereiner
Matthew J. Dooley
Rex Hardy
Commissioners

Certified as a true copy
Noel Coleman
Asst. Secretary, Public Utilities Commission
State of California

First Revised Page ..12-A
Cancels
Original Page 12-A

Minimum Rate Tariff No. 2

Item No.	Section No. 1—Rules and Regulations of General Application (Continued)

Application of Tariff—Carriers

Rates provided in this tariff are minimum rates established pursuant to the Highway Carriers' Act and the Household Goods Carriers Act and apply for transportation of property by radial highway common carriers, highway contract carriers and household goods carriers as defined in said Acts.

When property in continuous through movement is transported by two or more such carriers, the rates (including minimum charges) provided herein shall be the minimum rates for the combined transportation.

*20-D
Cancels
20-C

• • •

Rates, rules and regulations named in this tariff shall not apply to transportation by independent-contractor sub-haulers when such transportation is performed for other carriers. This exception shall not be construed to exempt from the tariff provisions carriers for whom the independent contractors are performing transportation service.

*Change
***Paragraph canceled
Decision No. 51832

Effective September 7, 1955

Issued by the Public Utilities Commission
of the State of California, San Francisco, California.
Correction No. 673

Appendix "F"

Decision No. 51922

Before the Public Utilities Commission
of the State of California

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers relating to the transportation of general commodities (commodities for which rates are provided in Highway Carriers' Tariff No. 2).	Case No. 5432 Petition for Modification No. 34 (Rehearing)

APPEARANCES

Edward M. Berol, Lewis Clark, and *Arlo D. Poe* for California Government Traffic Conference, petitioner.

Arlo D. Poe and *J. C. Kaspar,* for California Trucking Association, Inc. (formerly Motor Truck Association of California); *L. E. Osborne,* for California Manufacturers' Association; *T. A. L. Loretz,* Tariff Agent; *J. L. Beeler,* for Southwestern Motor Tariff Bureau; *Maurice A. Owens,* for Draymen's Association of Alameda County, Pacific Motor Tariff Bureau; *H. L. Matheuson,* for Pacific States Motor Tariff Bureau, Tank Truck Operators Tariff Bureau, and *Elmer Ahl,* Tariff Publishing Agent; *A. F. Schumacher* and *P. N. Kujachich,* for Owens-Illinois Glass Co., Pacific Coast Division; *Jess E. Francis,* for

Continental Freight Lines; *C. R. Nicherson*, for Pacific Coast Tariff Bureau and *T. A. L. Loretz*, Tariff Agent; *Harry Marioneaux, Marquam C. George* and *Walter Alves*, for Alves Service Transportation; *Harry Marioneaux* and *Walter Alves* for All-State Transportation Company; *Harry Marioneaux*, for J. A. Nevis Trucking, Inc.; *Graeme Perton*, for Constructors Transport Co., Inc.; *Harold F. Culy*, for Culy Transportation Co., Inc.; *E. J. Muzio*, for Miles & Sons Trucking Service and Miles Motor Transport System; *John W. Smith*, for Southern Pacific Company and Pacific Motor Trucking Company; *James E. Doyle*, for Doyle Draying Co.; *W. J. Pope*, for Aetna Freight Lines; *Peter Vinick*, for Lodi Truck Service; *S. A. Moore*, for Permanente Cement Co.; and *Leslie C. George* for Leslie C. George, Refrigerated Trucking, interested parties.

Clement T. Mayo, Commerce Counsel, Bureau of Supplies and Accounts, Department of the Navy, for the Department of Defense and the Executive Agencies of the U. S. Government; and *Earl S. Williams*, for the Department of Finance of the State of California.

J. A. McCunniff and John W. Mallory, for the Commission's staff.

OPINION AND ORDER.

On May 3, 1955, the Commission issued its order granting rehearing with respect to Decision No. 51047, issued January 25, 1955, herein. On August 16, 1955, and prior to the rehearing the Commission on its own motion issued Decisions Nos. 51831, 51832, and 51833 by reason of amendments to Section 530 of the Public Utilities Code to become effective September 7, 1955. Decision No. 51832 which cancelled the rule in Item 20 of Minimum Rate

Tariff No. 2, allowing highway permit carriers to deviate from the minimum rates in connection with the transportation of property for the Armed Forces of the United States, is within the scope of this proceeding.

Public hearings were held before Examiner Cline at San Francisco on August 25, 1955. The matter was taken under submission subject to the filing on August 26, 1955, of a written request on behalf of the Department of Defense to postpone the effective date of Decision No. 51832 and a written request on behalf of Alves Service Transportation to extend the effective date of Decisions Nos. 51831 and 51832. On August 26, 1955, the Department of Defense filed a petition herein to postpone the effective date of Decision No. 51832, and Alves Service Transportation filed a petition for rehearing and extending of effective date of Decisions Nos. 51831 and 51832.

At the hearing the representative for the petitioner, California Government Traffic Conference, stated that nothing further would be offered as Decision No. 51832 satisfactorily handled the matter with which the California Government Traffic Conference had been concerned.

The representative for the Department of Defense stated that in his opinion the minimum rates established in Minimum Rate Tariff No. 2 are not appropriate for the movement of traffic for the Armed Forces of the United States, and unless satisfactory rates for such traffic could be established on an interim basis before September 7, 1955, the effective date of Decision No. 51832 should be extended. The presiding examiner properly ruled that requests for authorization to establish reduced rates for the United States pursuant to Section

530 of the Public Utilities Code, as amended, would be outside the scope of this proceeding and should be the subject of separate petitions. The Department of Defense has requested the Commission to postpone the effective date of Decision No. 51832 for a period of 90 days or until: (a) acceptable rate publications of permitted carriers setting forth the actual rates to be charged the Government can be formulated, and (b) reasonable and acceptable carrier tenders can be negotiated to fit the Government traffic pattern, which are acceptable to this Commission.

The petition of Alves Service Transportation requests that the effective date of Decision No. 51832 be extended for a period of 90 days.

No one opposed the requests for extension of the effective date of Decision No. 51832. However, the representatives for petitioner and the California Manufacturers Association urged that the Commission grant any request for extension of the effective date of Decision No. 51832 only after careful and thorough consideration.

As grounds for the extension of the effective date the Department of Defense in its petition stated:

1. The Department of Defense is one of California's largest shippers.

2. In many instances military installations are outside the immediate boundaries of the commercial zones of large industrial centers. Rates available to commercial shippers in such commercial zones are not available in many instances for the movement of military traffic emanating from and destined to military installations.

3. If Decision No. 51832 is permitted to go into effect as scheduled on September 7, 1955, it will have

a tremendous impact on the movement and distribution of traffic for the Armed Forces and will create chaotic conditions in the movement of such traffic.

4. Military traffic is not a burden on commercial traffic.

5. The Department of Defense favors reasonable rates on a stabilized basis. Class rates are not proper under all circumstances for the movement of military traffic. Military traffic often moves in sufficiently large quantities to entitle it to commodity rates.

6. Rate quotations of carriers for the account of the Armed Forces should be filed with this Commission.

7. The military department should have available to it flexible rate adjustment machinery.

8. In order that military traffic can continue to move by permitted carriers, it is essential that rates of permitted carriers continue to be in written form and to be filed with the Governmental Agencies.

9. The Department of Defense is conducting negotiations with California tariff agencies to modify rate tenders in such a manner as to make them acceptable to the Department of Defense and it is believed that differences can be resolved within a relatively short time. Until such time as mutually acceptable tenders are negotiated, the Government is opposed to Decision No. 51832 becoming effective.

10. If Decision No. 51832 becomes effective September 7, 1955, after said date and until acceptable permitted carrier tenders are formulated and, where necessary, approved by this Commission, military traffic of necessity will have to be transported by common carriers regardless of the adequacy or inadequacy of their services and the reasonableness of their traffic rates.

At the hearing the representative for the Department of Defense stated that in the opinion of the Department of Defense reparations might be recovered from common carriers for certain military shipments handled at minimum rates or higher, whereas no such reparations could be recovered in similar circumstances from permitted carriers.

After careful consideration of the record the Commission is of the opinion and finds that the effective date of the elimination from Minimum Rate Tariff No. 2 of the rule in Item 20 permitting transportation for the Armed Forces at free or reduced rates should be extended to December 5, 1955, in order to give the carriers and their tariff publishing agents reasonable opportunity to negotiate rate tenders mutually satisfactory to themselves and to the Department of Defense and, where necessary, to seek authority from this Commission to establish such rate tenders as their lawful rates pursuant to Section 530 of the Public Utilities Code, as amended. The petition for rehearing of Decisions Nos. 51831 and 51832 and for extending the effective date of Decision No. 51831 filed by Alves Service Transportation will be the subject of a separate order of this Commission.

Therefore, good cause appearing, it is hereby ordered that:

1. Minimum Rate Tariff No. 2 (Appendix "D" of Decision No. 31606, as amended), be and it is hereby further amended by incorporating therein, to become effective September 6, 1955, except as otherwise provided, Second Revised Page 12-A cancels First Revised Page 12-A and Original Page 12-A, which Second Revised Page 12-A is attached hereto and by this reference made a part hereof.

2. The third paragraph of Item 20 E of Minimum Rate Tariff No. 2 appearing on said Second Revised Page 12-A be and it is hereby cancelled effective December 5, 1955, as shown thereon.

3. In all other respects said Decision No. 31606, as amended, shall remain in full force and effect.

4. Except to the extent herein granted, petition for modification No. 34 to Case No. 5432 is hereby denied.

Paragraphs numbered 1 and 3 of this order shall become effective September 6, 1955, and paragraphs numbered 2 and 4 of this order shall become effective September 26, 1955.

Dated at San Francisco, California, this 6th day of September, 1955.

Peter E. Mitchell
President
Justus F. Craemer
Rex Hardy
Commissioners

Commissioner Ray E. Untereiner Matthew J. Dooley, being necessarily absent, did not participate in the disposition of this proceeding.

Certified as a true copy:
Noel Coleman
Assistant Secretary
Public Utilities Commission
of the State of California.

Second Revised Page..12-A
Cancels
First Revised Page ...12-A
and
Original Page.....12-A Minimum Rate Tariff No. 2

Item No.	Section No. 1—Rules and Regulations of General Application (Continued)

Application of Tariff—Carriers

Rates provided in this tariff are minimum rates established pursuant to the Highway Carriers' Act and the Household Goods Carrier Act and apply for transportation of property by radial highway common carriers, highway contract carriers and household goods carriers as defined in said Acts.

When property in continuous through movement is transported by two or more such carriers, the rates (including minimum charges) provided herein shall be the minimum rates for the combined transportation.

*20-E Cancels 20-D and 20-C

(1) Radial highway common carriers, highway contract carriers and household goods carriers may deviate from the minimum rates named in this tariff in connection with the transportation of property for the armed forces of the United States.

Rates, rules and regulations named in this tariff shall not apply to transportation by independent-contractor sub-haulers when such transportation is performed for other carriers. This exception shall not be construed to exempt from the tariff provisions carriers for

whom the independent contractors are performing transportation service.

*(1) The provisions of this paragraph are canceled effective December 5, 1955.

*Change, Decision No. 51922

Effective September 6, 1955
(Except as otherwise provided.)

Issued by the Public Utilities Commission
of the State of California, San Francisco, California.
Correction No. 674

Appendix "G"

Decision No. 52287

Before the Public Utilities Commission
of the State of California

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers relating to the transportation of general commodities (commodities for which rates are provided in Minimum Rate Tariff No. 2).	Case No. 5432 (Petition No. 34) (First Supplemen

SUPPLEMENTAL OPINION AND ORDER

By Decision No. 51832 of August 16, 1955, following amendments to Section 530 of the Public Utilities Code, the rule in Item No. 20 of Minimum Rate Tariff No. 2, which allowed highway permit carriers to deviate from the minimum rates in connection with the transportation of property for the Armed Forces of the United States, was canceled. Following representations of the Department of Defense and other interested parties, the effective date of the cancellation of the tariff rule was postponed to December 5, 1955, in order to give the carriers and their tariff publishing agents reasonable opportunity to negotiate rate tenders mutually satisfactory to themselves and to the Department of Defense and, where necessary, to seek authority from this Commission to es-

tablish such rate tenders as their lawful rates pursuant to Section 530 of the Public Utilities Code, as amended (Decision No. 51922, dated September 6, 1955, in this proceeding).

By petition filed November 21, 1955, the Department of Defense seeks a further 60-day postponement. The petitioner avers that it has attempted diligently and in good faith to meet the December 5 date, but that because of the magnitude of the task it is unable to do so.

By the amendment to Section 530 of the Public Utilities Code, which was enacted by the legislature and became effective September 7, 1955, the general right of common carriers to transport property for government agencies at free or reduced rates was removed, subject to such exceptions as the Commission may consider just and reasonable. The provisions of Item No. 20 of Minimum Rate Tariff No. 2 which permits carriers to deviate from the minimum rates in connection with the transportation of property for the Armed Forces of the United States constitutes an exception which was established prior to the amendment of Section 530. So long as this provision remains in effect, not only the permitted carriers but also the common carriers are without the rate regulation which clearly was contemplated under the recent legislative enactment. (See Decision No. 51831 dated August 16, 1955, in Case No. 5432.) As hereinbefore stated, the Commission has once postponed the cancellation of this provision for a period of 90 days upon representations that during such period satisfactory rate arrangements would be negotiated and proposed to the Commission for its consideration.

The intent of the legislature should be carried out without further delay. Accordingly, the petition for further postponement will be denied. This action will in no way preclude carriers from filing applications for such rate exceptions as they may consider to be just and reasonable.

Therefore, good cause appearing,

It Is Hereby Ordered, that first supplemental petition for Modification No. 34, in Case No. 5432, filed November 21, 1955, by the Department of Defense, be and it is hereby denied.

This order shall become effective twenty days after the date hereof.

Dated at San Francisco, California, this 29th day of November, 1955.

Peter E. Mitchell
President
Justus F. Craemer
Ray E. Untereiner
Matthew J. Dooley
Commissioners

Certified as a true copy:
Noel Coleman
Assistant Secretary
Public Utilities Commission
of the State of California